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In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, PETITIONER

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit reversing the respondents' convictions and remanding for a new trial.

OPINIONS BELOW

The opinions of the court of appeals (App. A., *infra*, pp. 1a–38a) are reported at 426 F. 2d 32; its opinion denying rehearing and the order of the court denying rehearing *en banc* are unreported (App. C., *infra*, pp. 40a–43a). The opinion of the district court denying defendant's motions for judgments of acquittal notwithstanding the verdict, or for a new trial is reported at 281 F. Supp. 837.[1]

[1] Pre-trial opinions in this case are reported at: 205 F. Supp. 94 (denial of defense motions to stay the prosecution pending completion of related Federal Trade Commission proceedings); 217 F. Supp. 199 (denial of defense motions to strike allega-

JURISDICTION

The judgment of the court of appeals reversing the judgments of conviction was entered on April 16, 1970. The orders of the court denying the government's timely petition for rehearing and denying rehearing *en banc* were entered on December 1, 1970. On December 21, 1970, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari to and including January 30, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in reversing criminal convictions by a jury in a major and complex antitrust conspiracy case because of alleged errors in the instructions, the court of appeals applied an improper standard of review by considering particular language in isolation rather than evaluating the charge in its entirety in the light of all the evidence and the defendants' arguments to the jury.

2. Whether the trial judge:

(a) properly (i) permitted both sides to argue to the jury the significance of the conduct of an unindicted firm in the industry while barring defendants from discussing that firm's presumption of innocence, and (ii) charged the jury that it may consider the

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tions of unreasonably high profits and prices from the indictment and to dismiss the monopolization count); 245 F. Supp. 801 (granting motions of the individual defendants to dismiss the indictment as to them on the ground that they were immune from prosecution); 1967 Trade Cas. ¶72,170 (denial of defense motions to dismiss the indictment for prejudicial delay in impaneling the grand jury which returned it and for discovery of the Justice Department's internal memoranda which bore on the alleged delay).

conduct of the unindicted firm but is to draw no inferences from the fact that it was not indicted;

(b) unduly stressed an inflammatory issue when it told the jury that it may consider defendants' high profits and uniformly high prices along with other evidence bearing on the charge of conspiracy;

(c) should have charged that before the jury can convict it must find false the denials of illegal agreement by defendants' officials;

(d) in his charge unduly emphasized the patent aspects of the case, inaccurately described patent license arrangements among defendants and co-conspirators and improperly explained the significance of preconspiracy conduct by one of the defendants.

STATUTE INVOLVED

Sections 1 and 2 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. 1 and 2) provide in pertinent part:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.
>
> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT

In this criminal antitrust case a jury convicted three corporations, Chas. Pfizer & Co., Inc. ("Pfizer"), American Cyanamid Company ("Cyanamid") and Bristol-Myers Company ("Bristol") under a three-count indictment of (1) conspiring to restrain, (2) conspiring to monopolize, and (3) monopolizing trade in four broad-spectrum antibiotic drugs, in violation of Sections 1 and 2 of the Sherman Act.[2] The indictment also described Olin Mathieson Chemical Corporation ("Squibb") and the Upjohn Company ("Upjohn") as co-conspirators. Each defendant was fined the maximum of $50,000 on each count.

A divided panel of the court of appeals reversed and remanded for a new trial, primarily because of errors in the instructions to the jury (426 F.2d 32; App. A, *infra*, pp.1a–38a). The full court initially granted the government's petition for a rehearing *in banc* (App. B, *infra*, p. 39a) but vacated its order, 4–3 (App. C, *infra*, pp. 40a–43a), after the panel rendered a second opinion (App. C, *infra*, pp. 41a–42a) denying rehearing but modifying its earlier ruling.

The Facts

The facts are stated in the light most favorable to the verdict.

Tetracycline and the broad spectrum antibiotic market. The product market consisted of four clinically interchangeable "wonder drugs": ***chlortetracycline,*** patented by Cyanamid in 1949 and manufactured and sold exclusively by it under its brand name "Aureomy-

[2] The principal official of each company also was indicted, but the charges against them were dismissed on the ground that they had acquired immunity by testifying before a grand jury. *United States* v. *Chas. Pfizer & Co.*, 245 F. Supp. 801.

cin"; *chloramphenicol,* patented by Parke, Davis & Company in 1949 and manufactured and sold exclusively by it under its brand name "Chloromycetin"; *oxytetracycline,* patented by Pfizer in 1950 and manufactured and sold exclusively by it under its brand name "Terramycin"; and *tetracycline,* first marketed by Cyanamid in 1953 but ultimately patented by Pfizer in 1955. During the period of the conspiracy, November 1953 to August 1961, six companies manufactured or sold these drugs: Pfizer, Cyanamid, Bristol, Squibb, Upjohn, the alleged conspirators; and Parke, Davis which was not charged or named as a conspirator.[3] Total broad spectrum antibiotic product sales from 1954 through 1961 amounted to more than $1.1 billion.[4]

Tetracycline, the last drug to be introduced, was the keystone of the market's price structure. Unless its production could be restricted and its price controlled, unrestrained competition threatened to reduce drastically the price of all broad spectrum antibiotic drugs, as experience with unpatented penicillin had demonstrated.[5] Thus the indictment charged (Ind., ¶45; 33a) that the conspiracy was directed at controlling the manufacture and sale of tetracycline, with the underlying broader objective of maintaining uniform prices on all broad spectrum antibiotic products.[6]

Proof of the conspiracy was entirely circumstantial. It focused on four principal circumstances: (1) a patent interference settlement and cross-licensing ar-

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[3] Ct. X 4, pp. 2–3; 6692a–6693a. (Page numbers followed by "a" refer to pages in the twenty-one volume joint appendix.)

[4] GX 875; 10244a.

[5] 3686a–3688a.

[6] Total tetracycline product sales constituted 45.7 percent of all broad spectrum antibiotic product sales in 1954, 66.8 percent in 1957 and 56.2 percent in 1961 (GX 877; 10246a).

rangement between Cyanamid and Pfizer and the sale of bulk tetracycline by Cyanamid to Pfizer in November 1953–January 1954; (2) certain misrepresentations made by Pfizer and Cyanamid to the Patent Office, which resulted in the issuance of the patent on tetracycline to Pfizer in January 1955; (3) the settlement in December 1955 of various suits between Pfizer and Bristol, Squibb and Upjohn involving the validity of the tetracycline patent, and Pfizer's simultaneous grant of licenses under the patent to Bristol to manufacture and sell, and to Squibb and Upjohn to package and sell only; and (4) the uniform published prices on the antibiotic drugs, which were unchanged despite shifting market shares, varying costs and sales gains by high cost producers, and despite a large gap between production cost and sales price which left ample room for price cuts designed to increase or regain market shares.

The Pfizer-Cyanamid arrangements and the patent on tetracycline. At meetings in November 1953, Pfizer and Cyanamid settled an impending interference proceeding between them. They agreed to exchange proof of priority, that the "loser" would concede priority, and that the "winner" would license the "loser" under its tetracycline patent.[7] In addition, Pfizer received bulk tetracycline with which to enter the market[8] (Cyanamid had begun manufacture first), a li-

[7] In late 1953, when Pfizer and Cyanamid negotiated these agreements, they together dominated the broad-spectrum antibiotic market. In 1953 Pfizer (Terramycin) and Cyanamid (Aureomycin and tetracycline) accounted, in approximately equal shares, for 92.1 percent of total broad-spectrum antibiotic product sales (GX 909; 10287a).

[8] 2303a, 2392a–2405a, 2456a–2458a, 2772a–2773a; GX's 285–295, 644; 8785a–8795a, 8972a.

cense to produce Aureomycin (chlortetracycline) to use as the base in the production of tetracycline, and Cyanamid's know-how and most efficient bacteria culture for Aureomycin production. After an exchange of proofs of priority, Cyanamid conceded priority to Pfizer.[9]

Bristol had applied for a patent on a salt form of tetracycline[10] and a second interference was declared involving Bristol, Pfizer and Cyanamid.[11] The examiner handling this proceeding suspected that tetracycline was co-produced with Aureomycin and that no invention was therefore involved in identifying it.[12] Both Pfizer and Cyanamid separately made misrepresentations to the patent examiner to overcome his suspicions. Their efforts were successful and Pfizer received the tetracycline patent in January 1955.[13]

Pfizer's arrangements with Bristol, and the Squibb-Upjohn licenses. In December 1955 Pfizer and Bristol reached an understanding under which Pfizer agreed to license Bristol to manufacture and sell tetracycline, and to license Squibb and Upjohn, Bristol's bulk customers, to purchase and sell, but not to manufacture the drug. They also settled infringement suits which Pfizer had brought against Bristol, Squibb and Upjohn, and the latter's counter suits for declaratory relief against Pfizer.[14]

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[9] GX 7, pp. 6–7; 7561a–7562a.

[10] GX 10; 7889a–7916a.

[11] GX 12, pp. 1–2; 8094a–8095a.

[12] See GX 5, p. 47; 7504a; GX 12, pp. 443–444; 8293a–8294a; 4400a, 4409a–4410a; GX 4, pp. 34–36; 7404a–7406a.

[13] GX 3; 7365a–7367a.

[14] GX 15; 8383a–8384a; GX 16; 8385a–8386a; GX 17; 8387a–8388a; GX 18; 8389a–8390a; GX 19; 8391a–8392a; GX 20; 8393a–8395a.

Bristol was able to negotiate for Squibb and Upjohn because it had previously made agreements with them under which they agreed to purchase their tetracycline requirements from Bristol for the duration of the infringement litigation plus three years, and Bristol assumed all liability for infringement; Squibb and Upjohn agreed not to settle or negotiate directly with Pfizer. Bristol also promised to obtain for them a license "which may, however, be limited to your right to purchase, use and sell tetracycline ~~to the~~ drug trade."[15] It was able to settle with Pfizer because of a threat to use a wire-tapping episode in the infringement litigation.[16] Bristol received an unlimited license under the tetracycline patent and obtained non-manufacturing licenses for Squibb and Upjohn which had to look to Bristol for their bulk supplies.

The result of the patent and licensing arrangements was that Pfizer had the controlling patent, only Cyanamid and Bristol had licenses to manufacture, and Squibb and Upjohn had the "right" to process and sell what they purchased from Bristol. The government contended that Pfizer, Cyanamid and Bristol had agreed that only they would manufacture tetracycline, that only Bristol would sell in bulk, but only to Squibb and Upjohn (Ind. ¶45; 33a).

Parke, Davis, the other major manufacturer of broad-spectrum antibiotics, never made or sold tetracycline and played no part in any of the above transactions. Parke, Davis rejected Bristol's invitation to become Bristol's second bulk customer for tetracycline.[17]

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[15] GX 108; 8698a–8705a (Bristol-Upjohn); GX 83; 8639a–8647a (Bristol-Squibb).

[16] 2515a–2517a, 2633a, 2889a–2890a, 3135a–3137a.

[17] 2894a–2895a, 3317a–3318a.

Identical Pricing. Control of tetracycline having been assured, the published prices on all broad spectrum antibiotic drugs remained substantially identical and unchanged from 1953 to 1960,[18] despite the steadily expanding role of tetracycline as each company, except Parke, Davis, introduced it into the market. Prior to 1951 the published prices on broad-spectrum antibiotics had been reduced in response to the introduction of a new product.[19] But the price on tetracycline was maintained at the prices for broad-spectrum antibiotics in effect in January 1954, although individual companies' market shares shifted substantially during this period, and the demand fluctuated.[20] Pfizer and Cyanamid actually lost market shares to the higher cost sellers, Squibb and Upjohn.[21] Sales prices were many times higher than production costs[22]—a fact which, according to the government, would have permitted profits even if prices were cut to preserve or increase market shares. This fact, together with defendants' adherence to a uniform price despite differing costs[23] and shifting market shares, formed the basis for the allegations in the indictment that defendants' prices and profits were "unreasonably high."

The Trial and Verdict

The trial lasted nine weeks; the printed record contains more than 12,000 pages. The government's case involved three broad categories of proof: (1) data bear-

[18] GX's 920–927, 930; 10310a–10318a, 10324a.

[19] 2746a–2748a.

[20] See GX's 876, 877; 10245a, 10246a.

[21] *Id.*

[22] *Compare* GX 934; 10325a, *with* GX's 921, 922; 10311a, 10312a.

[23] GX 934; 10325a.

ing on prices, production costs, gross profits and market shares; (2) testimony of defendants' officials concerning the various arrangements among the defendant companies and co-conspirators; and (3) testimony and documents relating to the misleading of the patent examiner. Defendants' strategy was to develop their defense largely through cross-examination of their own officials during the government's case. Pfizer called one witness; the other defendants offered no evidence after the government's case was completed. The district court (Judge Frankel) delivered a lengthy charge, and the jury returned guilty verdicts. Relevant portions of the charge are discussed below.

The Opinions and Orders of the Court of Appeals

In reversing the convictions, the court of appeals held that the instructions to the jury were erroneous in five respects; and that on one of those five issues the trial court had improperly restricted the defendants' ability to argue to the jury:

First, the case was submitted to the jury on a different theory from that specified in the indictment and the bill of particulars. The court interpreted these documents as charging that specific agreements had been entered into at specific meetings between specific individuals, *i.e.*, at the Pfizer-Cyanamid meetings in November 1953 and the Pfizer-Bristol meetings in December 1955. But the charge treated the case as based upon a general course of conduct throughout the years, thus misleading both the jury and the defense.[24]

[24] 426 F. 2d at 34, 36, 37, 38–43, 47–48; App. A, *infra*, pp. 4a, 7a, 10a–11a, 13–22a, 32a–33a.

Second, because the case was based upon specific agreements, the testimony of defendants' officials denying the existence of any illegal agreements or understandings was crucial and the jury should have been told that in order to convict it had to find that those officials had lied. The instructions also unduly stressed the evidence relating to unreasonably high prices and profits and fraud on the Patent Office, thereby distracting the jury's attention from whether the participants had entered into illegal agreements at the meetings.[25]

Third, the trial judge had improperly restricted the defendants' ability to ask the jury to draw inferences favorable to them from similarities between their conduct and that of Parke, Davis, which was not a conspirator; and the charge to the jury unfairly depreciated the significance of comparisons with Parke, Davis.[26]

Fourth, the instructions concerning Pfizer's arrangements with Bristol for licenses by the former to Squibb and Upjohn could have conveyed the impression that the licenses on their face contained a ban against manufacture when in fact the only bar to manufacture was the patent. This might have led the jury to conclude from the agreements themselves that Pfizer and Bristol had illegally imposed restrictions on Squibb and Upjohn, even though the agreements themselves were concededly lawful and their illegality depended upon other factors.[27]

Fifth, the charge should have stated that Bristol's activities prior to its alleged entry into the conspiracy

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[25] 426 F. 2d at 40–41 43, 48; App. A, *infra*, pp. 16a–18a, 22a, 32a–33a.

[26] 426 F. 2d at 43–45; App. A, *infra*, pp. 22a–26a.

[27] 426 F. 2d at 45–46; App. A, *infra*, pp. 26a–29a.

in December 1955 could not be considered "as proof of Bristol's being in any conspiracy." This, together with the charge that it was unnecessary to prove the precise dates of the conspiracy, might have led the jury to conclude that Bristol had joined the conspiracy prior to that date.[28]

Judge Hays, dissenting,[29] concluded that the evidence was sufficient; that the instructions on patent fraud and unreasonably high prices were proper; that it was quite unlikely that the jury was misled by the instructions on Parke, Davis, or the licenses to Squibb and Upjohn; and that the jury could find that Bristol agreed to exclude competitors.

Following the grant of the government's petition for rehearing *in banc*, the panel issued a short opinion (App. C, *infra*, pp. 41a–42a) denying rehearing. The panel stated that the instructions permitting the jury to find a conspiracy from defendants' course of conduct were proper, and that "we do not rely upon the express agreement contention as a ground for reversal." It concluded, however, that "taken as a whole" the other errors found denied the defendants a fair trial. These errors related to the Parke, Davis defense, to the truth or falsity of defendants' testimony about the November 1953 and December 1955 meetings and to the "undue emphasis on the excess of selling prices over factory costs." The court stated that if reversal for these errors were not required, it would then have to consider "many other contentions" of the defendants, one of which was Bristol's argument that there was insufficient evidence to warrant submission to the

[28] 426 F. 2d at 46–47; App. A, *infra*, pp. 29a–32a.

[29] 426 F. 2d at 48–50; App. A, *infra*, pp. 33a–38a.

jury of the question whether Bristol conspired with Pfizer and Cyanamid to exclude others from the tetracycline market. The court "incline[d]" to that view and stated that it would require a new trial.

On the basis of the opinion denying rehearing, the full court, dividing four to three, denied rehearing *en banc* (App. C, *infra*).

REASONS FOR GRANTING THE WRIT

1. This is one of the most important criminal antitrust cases in recent years. After a nine-week trial (the printed record of which contains 12,000 pages), a jury convicted three of the country's leading pharmaceutical manufacturers of conspiring to fix prices on widely used and vital antibiotic drugs, the conspirators' sales of which were $855 million of the industry's total of $1.1 billion (GX 875, 10244a); and of conspiring to monopolize and monopolizing the production and sale of those drugs. The matter was submitted to the jury under a lengthy charge by a highly regarded district judge which, we believe, fairly and clearly explained the issues to be decided, the governing legal principles and the significance of the evidence produced by both sides. A divided court of appeals reversed the convictions on the ground that the judge had committed reversible error in certain of his instructions, and remanded for a new trial; the court denied rehearing *en banc* by a four-to-three vote.

On its face, the initial opinion of the court of appeals appears to involve only the application of settled principles of antitrust and criminal law to these particular facts; it does not cite a single decision. But the case involves far more than that. The

indictment of the defendants followed an extensive congressional investigation of their pricing practices on these vital antibiotic drugs[20]—an inquiry that reflected deep public concern over practices in an industry whose operations are crucial to the nation's health—and a lengthy Federal Trade Commission proceeding relating to the same matters.[21] As we show below, the instructions that the court of appeals' decision requires a district judge to give in cases of this type would place an unwarranted and serious burden upon the government in the prosecution of criminal antitrust cases involving price fixing and other restrictive practices in oligopolistic industries, where there rarely is direct proof of the conspiracy and the government almost invariably has to rely upon circumstantial evidence.

There was no dispute in this case about what the defendants did or that, if their actions were the result of a combination or conspiracy rather than independent decision, they violated the law. The jury had before it a great amount of evidence concerning the defendants' pricing practices, the circumstances surrounding the issuance of the patent on the last of these drugs to be marketed, and the limited scope of

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[20] Report of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, "Administered Prices—Drugs," S. Rep. No. 448, 87th Cong., 1st Sess. (1961); *United States* v. *Charles Pfizer & Co.*, 245 F. Supp. 801, 805-807 (S.D.N.Y.).

[21] *Matter of American Cyanamid Co., et al.*, 63 FTC 1747, vacated and remanded, *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757 (C.A. 6), *Matter of American Cyanamid Co., et al.* [1967-1970 Transfer Binder], Trade Reg. Rep. ¶18,077, affirmed *Chas. Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574 (C.A. 6), certiorari denied, 394 U.S. 920.

the few licenses that the defendants had issued, as well as defendants' explanations that their conduct simply reflected independent business judgment, and their denials of illegal agreement. It concluded that defendants' conduct reflected concerted endeavor rather than individual business judgment. On the evidence in this case, that conclusion was fully warranted—in short, this is not a "fact" case in the sense that there can be no question that the proof here supports the jury's verdict.

In a case such as this, the trial judge necessarily must have considerable leeway in charging the jury. A conviction should not be reversed merely because appellate judges conclude that in some respects the language in the charge could have been more specific, or that the judge should not have emphasized some things quite as much as he did or should have given greater weight to others. When price fixing occurs in oligopolistic industries, the conspirators are seeking to insure themselves against competitive deviations from the administered prices which tend to supplant classic market forces as the competitive norm. In such cases, all that the court's charge should be required to do is to explain fairly and clearly in a way that the average man can understand what the law is, what issues the jury must decide and upon what basis it should do so.

The emphasis given particular portions of the charge and their validity must be gauged in the light of the entire trial, the complexity of the evidence and the charge as a whole. Language that might seem erroneous and significant if viewed in isolation frequently turns out to be either permissible or, if erroneous, not prejudicial when viewed in the broader context.

Cf. *Andres* v. *United States*, 333 U.S. 740, 745; *Kotteakos* v. *United States*, 328 U.S. 750, 763; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242. Judged by this standard, we submit that the trial judge's instructions here fairly and adequately presented the case to the jury, and that the court of appeals should not have reversed the convictions. We discuss below our reasons for this conclusion.

Beyond this, however, we believe that this is one of those unusual situations in which, because of the inherent importance of the case to the public interest and the serious consequences for future criminal antitrust enforcement that the court of appeals' approach to reviewing the trial judge's instructions portends, it is important for this Court to review that court's decision.

2. (a) Parke, Davis, one of the four principal firms manufacturing and selling broad-spectrum antibiotic drugs, was neither indicted nor named as a conspirator. Certain of Parke, Davis's practices (identity of prices, package-size, dosage forms, and marketing techniques) paralleled those of the defendants who, the government claimed, had acted pursuant to a conspiracy. Others were different. It never handled tetracycline. It never licensed anyone to manufacture or sell its patented antibiotic, Chloromycetin; it never obtained a license for the manufacture or sale of any other broad-spectrum product; it never bought or sold such products in bulk; indeed, it declined Bristol's offer to furnish it bulk tetracyline; and it was not involved in the patent interferences or settlements, the cross-licensing agreements, or the various meetings and negotiations between Pfizer and the other conspirators concerning tetracycline.

One of the defendants' major contentions at the trial was that the fact that a non-conspirator did some of the same things they did showed that their actions did not result from conspiracy. Extensive evidence was introduced relating to Parke, Davis. Two of the defendants briefly argued the point to the jury, the court gave the jury an instruction on it, and twice during its deliberations the jury requested and received evidence relating to Parke, Davis. The court of appeals held that the district court committed reversible error in restricting the defendants' ability to argue the point to the jury and in its instructions on the issue. In the light of the entire record, however, we submit that the trial court properly and appropriately handled this issue.

The defendants wanted to stress to the jury the presumption of innocence covering Parke, Davis. The trial court declined to permit that argument (4646a) but informed counsel (*ibid.*) that "in arguing the evidence to the jury both sides are entitled to deal with the reality that a substantial factor in this relevant market is Parke, Davis," and that—

> I will allow everybody to risk arguments in summation based on comparisons between the defendants and Parke, Davis. I have indicated to you that I think there is a risk in that to which the defendants ought to be peculiary sensitive.
>
> I must allow the government, if I allow the defendants to do this, to argue the differences at least in rebuttal between Parke, Davis and the alleged conspirators.

In their arguments to the jury, counsel for American Cyanamid and for Pfizer each referred briefly

to Parke, Davis. Cyanamid's counsel first discussed the evidence that Parke, Davis, "not claimed to be a conspirator," had reduced its prices to meet those of the defendants and that the defendants in turn had reduced their prices to meet Parke, Davis's reductions (4758a). He also pointed out (4759a) that a Parke, Davis official, Loynd "who isn't charged in any wrong-doing, specifically denied that there was any agreement with anybody about how he priced his goods, and I suspect if you remember Mr. Loynd you would agree, looking at him, that that would unquestionably be true" (4759a). Finally, he pointed out (4770a) that while Cyanamid "did not sell its antibiotic materials in bulk * * * it is true of Parke, Davis also." Pfizer's counsel referred to Parke, Davis's meeting Pfizer's own price reductions and argued that the reason for this price parallelism was that "It is clear from the acts of Lederle and Parke, Davis and it is not claimed there was any conspiracy between them, that neither of them wanted to be undersold by its competitors in terms of catalog price and Mr. Loynd testified that that was the case" (4811a).

Thus, defense counsel pointed out to the jury that Parke, Davis, which was not a conspirator, did many of the same things done by the defendants that, according to the government, resulted from conspiracy. Counsel might have argued the point more vigorously but their approach may have reflected concern over the judge's warning that pressing too hard could have led to strong rebuttal from the government emphasizing the differences between the conduct of Parke, Davis and the defendants. The limited references the defendants made in their closing argument to Parke, Davis seem more probably to have reflected their own

trial strategy rather than any limitation they believed the district judge had placed upon them. They had full opportunity to, and did, argue the significance of Parke, Davis not having been indicted and of that firm's parallel practices.

The pertinent portion of the judge's charge respecting Parke, Davis was as follows (5001a–5002a; App. D, *infra*, pp. 108a–109a):

> I come to one final observation I want to make in these instructions about something included in the evidence you have heard. There has been evidence about Parke, Davis and about Chloromycetin, the broad spectrum antibiotic which is alleged to have comprised part of the market involved in this case. You have learned that Parke, Davis was a substantial factor in that market, and I have mentioned the possible significance of that situation as it affects the question of monopoly and may affect other issues in this case. We have heard of various respects in which the practices of Parke, Davis as to dosages and prices and marketing techniques paralleled those of the defendants and of Squibb and Upjohn. We have also heard some evidence and argument concerning the differences between Parke, Davis and the defendants on trial here. You are aware, as counsel for both sides have stated, that Parke, Davis is not alleged to have been a member of the conspiracy charged by the government.
>
> Now, insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts about that subject have been placed before you and are part of the total evidence you may consider in reaching your judgment. However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direc-

> tion as a fact in itself. There is no profit here in speculating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom.

In view of defense counsel's references in their arguments to the fact that Parke, Davis was not a conspirator but did the same things that the government charged were the result of conspiracy when done by the defendants, the court's statement that the facts about "Parke, Davis and its activities * * * in the market * * * have been placed before you and are part of the total evidence you may consider in reaching your judgment" adequately informed the jury as to what consideration this evidence should be given. The court properly declined to permit the jury to "specula[e] as to why Parke, Davis was not indicted" or to point out, as the court of appeals apparently required, that it was innocent; had the court stressed those points, the jury might have drawn the impermissible inference that the mere indictment of the defendants carried some implication as to their guilt. The court's instruction correctly avoided this dilemma by telling the jury that the Parke, Davis evidence was part of the total picture it was to consider in determining whether the defendants' actions were the product of conspiracy or individual decision. Because the industry involved here is oligopolistically structured, price uniformity without agreement is expected by economic theory for a limited period of time. But that it should persist for more than half a decade, in the absence of any type of agreement among some of the leaders

in the oligopoly is questionable."[32] The issue was thus properly submitted to the jury. That the jury considered the evidence relating to Parke, Davis is shown by the fact that twice during its deliberations it requested evidence relating to that company.

(b) The court of appeals further erred in holding improper the instructions dealing with the government's contention that the defendants had charged "unreasonably high" prices on and made "unreasonably high" profits from the sale of broad-spectrum antibiotic drugs.

The trial judge told the jury that the defendants could charge any price they wished in the absence of agreement, but that it might consider whether the prices on broad-spectrum antibiotic products were "unreasonable" (which, the court explained, meant "unusual," "artificial" or "extraordinary") in the sense that they appeared to be unrelated to various market factors. He referred to the government's attempt to show, through the cost and profit evidence, that defendants' prices and profits were unreasonably high compared to their production costs, to their gross profits on other products, and to Squibb's and Upjohn's gross profits, and to the evidence that defend-

[32] "* * * in practice it appears that firms selling in such a market do not always seek a uniform monopoly price and, if sought, do not always attain it. Among the reasons why uniform monopoly prices are not sought or attained is that one seller may believe he can maximize his profits by expanding his total sales rather than taking a maximum profit on each sale. Also, even the mere addition of one seller to an oligopoly market makes the market more complex and less predictable. Therefore, there may be competitive actions and reactions in an oligopoly market." *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F. 2d 953, 965–966 (C.A.D.C.) (footnote omitted). See, also, *C-O-Two Fire Equipment Co.* v. *United States*, 197 F. 2d 489–493 (C.A. 9), certiorari denied, 344 U.S. 892.

ants' prices had remained stable despite variations in production costs of each seller and among the several sellers, and changes in overall demand and relative market share. He told the jury that production costs omitted cost items that should be included to calculate net profits, and reminded them of the defendants' contentions that gross profit data are misleading and meaningless, that their prices were in no way unreasonable or artificial, and that competition often results in price uniformity despite variations in production costs among sellers. Finally, he instructed that if the jury did not find defendants' prices and profits unreasonable, it should not consider that allegation; but that if it did find prices and profits unreasonable, that could be a factor, together with all the other circumstances, that would support an inference of an agreement on price, and would also tend to support the monopolization charge.[33]

The district court did not preclude the defendants from introducing any evidence relating to their total costs. It is true that the court did refuse to permit the defendants to present such evidence in connection with their cross-examination of the government's witnesses, but this ruling simply involved a determination of the order of proof and the need to authenticate the cost figures; the court required that the cost information be presented by the accountants responsible for the studies.[34] The defendants, of course, could

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[33] 4993a–4999a, App. D, *infra*, pp. 100a–106a.

[34] 1848a–1849a, 1988a–1990a. The government's evidence relating to costs and profits was taken from records the companies kept in the regular course of business. Pfizer and Bristol kept no business records showing "total" costs and net profits by products; Cyanamid did have business records of this type,

have introduced this evidence as part of their defense,[35] but for reasons best known to themselves they declined to do so; in effect, they elected to let the jury decide the case on the basis of the government's evidence relating to costs and profits. The court of appeals was thus in error in stating that "90% of the material essential to an accurate determination of costs [was] withheld from the jury by exclusion" (426 F. 2d at 43, App. A, *infra*, p. 22a); whatever was "withheld from the jury" was not "by exclusion" but as a result of the defendants' own choice.

The district judge's charge relating to high prices was carefully designed to avoid any "inflammatory" (426 F. 2d at 43; App. A, *infra*, p. 22a) effect this subject might have had. He cautioned that high prices do not themselves establish a conspiracy and he gave content to the term "unreasonably high prices" by referring to the other factors relating to this issue, namely, the uniformity of price among the defendants, the relation of prices to production costs, cost variations among the defendants, shifting market shares, and supply and demand.

In cases where proof of price fixing or attempted monopolization depends upon circumstantial evidence—as is likely in oligopolistic industries—the government frequently must rely upon evidence that the defendants charge uniformly high prices. Such evi-

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and the government introduced them in evidence. See the district court's post-trial opinion, 281 F. Supp. 837, 844–845, footnote 9. The studies showing "total" costs defendants attempted to introduce as a part of cross-examination during the government's case were special accounting studies prepared for use in a related Federal Trade Commission proceeding.

[35] See 998a–999a, 1687a–1688a, 1707a–1708a, 1849a, 1989a, 2205a, 4564a–4565a.

dence is highly relevant; the fact that the defendants charge such prices and do not reduce them in an attempt to gain a larger share of the market is a pertinent factor for the jury to consider, with the other evidence, in deciding whether the maintenance of such prices reflects only individual business judgment. The district court's charge on that issue in this case fully and fairy set forth the significance of these facts and the weight the jury was entitled to give to them. See, *e.g.*, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 804–806.[36] If, as the court of appeals suggests, the giving of such an instruction is reversible error, the government's ability successfully to prosecute price fixing and monopolization cases in oligopolistic industries would be seriously weakened.

(c) In its initial opinion the court of appeals held that the bill of particulars had limited the charge in the indictment to a conspiracy formed at specific meetings, and that the instructions were erroneous because they permitted the jury to convict on the basis of a conspiracy inferred from a general course of conduct. Officials of the defendants had denied on the stand that they had entered into any "agreement" at those meetings. As a corollary to its holding on the specific agreement point, the court of appeals ruled that the jury also should have been told that, in order to convict, it had to find that the defendant officials had testified falsely when they said there had been no "agreements" made at the meetings.

In rejecting the theory of specific agreement in its opinion on rehearing, the court of appeals also cut out the ground upon which the need for an instruction on

[36] The authorities are extensively discussed in the district court's post-trial opinion. 281 F. Supp. 837, 846–848.

false testimony rested. Since that opinion indicates, however, that the court of appeals still may believe that such an instruction was required, and since the giving of that instruction would introduce an unnecessary, confusing and prejudicial element in the future trial of antitrust cases, we show briefly why that instruction was not required and why the trial court's instructions on the point were proper.

Whether an "agreement" illegal under the Sherman Act has been made is a mixed question involving both factual and legal elements *United States* v. *Gypsum Co.*, 333 U.S. 364, 396.[37] In cases of this type, officials of defendant companies frequently deny that they had entered into any illegal agreements. Such a statement, however, may rest upon the witness' view as to what is necessary to constitute an illegal agreement. In deciding whether the defendants in an antitrust case have agreed to restrain or monopolize trade, the jury is not required to decide whether the witnesses who denied the making of such agreement committed perjury. Rather, the denials are just one factor that the jury must take into account in the light of all the evidence bearing on the issue.

The district court properly applied that standard in its instructions covering this testimony. It told the jury (5000a–5001a; App. D, *infra*, p. 108a):

> Along with all the other evidence in the case, you have heard the sworn testimony of the principal officers of the three defendant companies, and you have heard each of them deny in broad terms that there was any understand-

[37] See also, *United States* v. *General Motors*, 384 U.S. 127, 141, n. 16; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44–45; *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194, n. 9.

ing or agreement among them, either express or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. You must, obviously, give due and deliberate thought to this testimony, and ultimately attribute to it such weight as it permits in your impartial judgment. In performing this task, you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter. * * *

This is by no means to suggest to you that you overlook or reject the sworn testimony of defendants' officers. That's for your judgment, not mine. The point being made here, as you understand, is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you.[25]

See, also, the court's discussion of these instructions in its opinion denying the defendants' motions for

[25] A substantially similar charge was sustained in *United States* v. *American Radiator and Standard Sanitary Corp., et al,* (C.A. 3, Nos. 18,182–18,187, decided September 23, 1970), slip decision p. 43, now pending on petitions for writs of certiorari (Nos. 1047–1050, this Term). The Third Circuit noted the ruling on this point in *Pfizer*, but observed that the defendants before it had not preserved the point. It also viewed *Pfizer* as factually distinguishable.

acquittal notwithstanding the verdict or for a new trial. 281 F. Supp. 837, 849–850.

The court's statement that "the final answer to this central question in this case [whether there was a conspiracy] must be based upon the actual conduct of the defendants during the period covered by the indictment" applied the principles this Court has repeatedly announced. See, *e.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44; *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 195.

(d) Finally, the court of appeals held that the charge was erroneous in three other respects: (1) it gave undue emphasis to the patent issues, (2) it dealt improperly with the licensing arrangements between Pfizer and Bristol, and (3) it gave improper weight to Bristol's pre-conspiracy conduct.

(1) The patent aspects were not unduly emphasized in view of the fact that the case was, as the court now recognizes, circumstantial. The defendants' conduct with respect to the tetracycline patent was among the means and methods of accomplishing the conspiracy listed in the indictment and, like the evidence as to costs and prices, was part of the evidence to be considered with all other factors. The indictment referred to the defendants' restrictive licensing, mutual assistance to obtain a patent, suppression of litigation on the validity of the patent and withholding information from the Patent Office by Pfizer and Cyanamid.[39] Like the price-cost material this complex evidence necessarily required a great deal of time to introduce and, necessarily, it required comprehensive instructions to explain to the jury. Defendants submitted lengthy requests to charge on this aspect of

[39] Ind., ¶ 46(b), (c), (d), (e), (f), (i); 34a–35a.

the case[40] and the district judge received comments on his proposed charge. No defendant asserted that it was unduly long; they simply suggested minor changes and corrections.[41]

(2) The charge respecting the Pfizer-Bristol arrangements for the grant of non-manufacturing tetracycline licenses to Squibb and Upjohn (4988a–4989a; App. D, *infra*, pp. 94a–95a) was correct. Pfizer and Bristol could not lawfully agree that Squibb and Upjohn would not receive manufacturing licenses (*United States* v. *Krasnov*, 143 F. Supp. 184 (E.D. Pa.), affirmed *per curiam*, 355 U.S. 5). The charge made clear that the written agreements between the various alleged conspirators, including the Squibb-Upjohn licenses, were concededly lawful except with reference to other facts.[42]

The Squibb-Upjohn licenses contained no affirmative restrictions; they simply did not confer the right to manufacture and hence left Pfizer's patent a complete bar against the manufacture of tetracycline. This circumstance was made clear to the jury by the instructions explaining a patent monopoly,[43] and the jury was specifically told that it could not infer an antitrust violation from the licenses themselves.[44] The instruction the court would require suggests that for there to be an agreement or understanding Pfizer must have "promised" not to grant manufacturing rights to Squibb and Upjohn (426 F.2d at 45; App.

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[40] 5164a–5167a, 5169a–5172a, 5200a–5202a, 5204a–5216a, 5216a–5222a, 5543a–5549a.

[41] 7330a–7332a, 7339a–7340a, 7341a–7344a.

[42] 4966a, 4982a; App. D, *infra*, pp. 71a, 88a.

[43] 4960a, 4966a; App. D, *infra*, pp. 64a, 70a–71a.

[44] 4966a; App. D, *infra*, p. 71a.

A, *infra*, pp. 27a–28a). Such an element is not required to show agreement under the Sherman Act.

(3) The court of appeals' treatment of Bristol's pre-conspiracy activities is inconsistent with settled principles governing the significance of pre-conspiracy conduct in a conspiracy case. Evidence of acts and circumstances prior to the formation of a conspiracy is admissible for the purpose of establishing motive, intent and methods of operation, and to lay a foundation for showing illegal design. *United States* v. *Houlihan*, 332 F. 2d 8, 14–15 (C.A. 2), certiorari denied, 379 U.S. 828.

Under the instructions, the jury could not have concluded that Bristol was a party to the conspiracy before its December 1955 meetings with Pfizer, as the court of appeals suggests. The trial judge told the jury that "unless a defendant is found guilty upon the charge as he met and defended it, he or it cannot be found guilty at all,"[45] and repeatedly reminded the jury of the government's claim that Bristol joined the conspiracy in December 1955.[46] The government told the jury that until "Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal * * *."[47] Bristol repeatedly emphasized the same point.[48] Bristol's acts prior to its meetings with Pfizer did not become illegal retroactively. But the same acts done after an agreement respecting prices

[45] 4953a; App. D, *infra*, p. 57a.

[46] 4963a, 4971a–4972a, 4982a, 4999a; App. D, *infra*, pp. 68a, 77a, 88a, 107a.

[47] 4967a.

[48] 4721a, 4728a, 4736a, 4739a, 4744a.

or dealings with competing manufacturers could become part of a conspiracy. That was the point of the charge.

CONCLUSION

This case is clearly of great public interest and importance. It involves principles which are of general application in the field of criminal antitrust prosecutions. It is the kind of case which merits full review by this Court.

For the reasons stated the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1971.

APPENDIX A

United States Court of Appeals for the Second Circuit

Nos. 636–38—September Term, 1968

(Argued May 6, 1969—Decided April 16, 1970)

Docket Nos. 32493–95

UNITED STATES OF AMERICA, APPELLEE

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY, APPELLANTS

Before MOORE, FRIENDLY and HAYS, Circuit Judges

MOORE, Circuit Judge.

Chas. Pfizer & Co., Inc. (Pfizer), American Cyanamid Company (Cyanamid) and Bristol-Myers Company (Bristol) appeal from convictions after a jury trial for violations of the Sherman Act (15 U.S.C. §§ 1, 2). The indictment contained three counts, (I) "Combination and Conspiracy in Restraint of Trade"; (II) "Combination and Conspiracy to Monopolize"; and (III) "Monopolization." The defendants were found guilty on all three counts.

Two co-conspirators were named in the indictment Olin Mathieson Chemical Corporation (Squibb) and The Upjohn Company (Upjohn). The chief executive officer of Pfizer, Cyanamid and Bristol respectively

was also named as a defendant. Before trial the indictment was dismissed as to these individual defendants.

The indictment charged a conspiracy by defendants and co-conspirators to restrain trade in the broad spectrum antibiotic drug market. These drugs are enumerated more specifically later. In substance the alleged conspiratorial agreements were that:

(a) The manufacture of tetracycline be confined to Pfizer, Cyanamid and Bristol.

(b) The sale of tetracycline products be confined to Pfizer, Cyanamid, Bristol, Upjohn and Squibb.

(c) The sale of bulk tetracycline be confined to Bristol and bulk tetracycline be sold by Bristol only to Upjohn and Squibb.

(d) The sale of broad spectrum antibiotic products by the defendant companies and the co-conspirator companies be at substantially identical and non-competitive prices.

The government's bill of particulars provides the frame of reference for its claims. As to Pfizer and Cyanamid, the conspiracy to violate antitrust laws began in November 1953 and as to Bristol, Squibb and Upjohn in December 1955 (BP ¶2, 16). The alleged illegal acts were (a) in November 1953 "the illegal cross-license and bulk sales arrangement between Pfizer and Cyanamid which initiated the conspiracy in November 1953" (BP ¶27(a)); (b) Pfizer's confining the tetracycline market to Pfizer and Cyanamid in January 1954; (c) an allegedly illegal agreement in November 1955 whereby Bristol deprived Squibb and Upjohn of their right to manufacture tetracycline; and (d) illegal arrangements between Pfizer and Bristol in December 1955 settling the Bristol-Pfizer patent litigation and depriving Squibb and Upjohn of the right to manufacture tetracycline. Squibb and Upjohn

were named as co-conspirators—not defendants. McKeen (Pfizer), Malcolm (Cyanamid) and Schwartz (Bristol) fixed pricing policies (e). These three individuals authorized the illegal acts (f).

The government's case, except for minor details, was constructed in large measure:

(1) upon the testimony of John E. McKeen, President and Chairman of the Board of Directors of Pfizer, Wilbur G. Malcolm, Vice-President (to September 1, 1957), President (to April 25, 1961), and Chairman of the Board of Cyanamid and Frederic N. Schwartz, President of Bristol (and prior to January 1, 1958, President of Bristol Laboratories).

(2) upon written agreements entered into between some or all of the corporate defendants, many of which agreements related to the disposition of the patent controversies which had arisen *inter sese;*

(3) upon a mass of statistical information relating to production costs, gross profits, prices, etc., of the antibiotics here involved, designed to show that the defendants were reaping unusually high profits from their antibiotic drugs; and

(4) upon some eight days of testimony and exhibits related thereto dealing with the obtaining of the Pfizer tetracycline patent.

These officials testified at length as to the business situations which confronted them during the indictment period and the reasons for the actions taken in the exercise of their judgments to meet each situation as it arose and which called for solution in the light of the facts then confronting them.

Thus the government's case, insofar as actual proof is concerned, rests almost entirely upon oral and written statements from defendants themselves. Because of this circumstance, the facts may be said to be virtually undisputed.

The indictment, as limited by the bill of particulars, constituted the mold which formed the pattern of the government's case, namely, that a conspiracy was formed by Pfizer (McKeen) and Cyanamid (Malcolm) at meetings between them in November 1953 and that Bristol (Schwartz) joined that conspiracy at meetings between McKeen and Schwartz in December 1955. Since the facts as to the happenings of these two series of meetings are critical to the government's case, they must be kept under a spotlight.

It is impossible to condense the trial (the transcript of testimony and exhibits consists of some 12,000 printed pages) except in a highly selective manner, and then only by concentrating on the determinative facts.

The subject matter of the suit was the production and marketing by Pfizer, Cyanamid and Bristol of a broad spectrum antibiotic drug, tetracycline. Prior to 1952 there were three effective drugs in this field. In September 1949 Cyanamid had obtained a patent on aureomycin which it had first marketed in September 1948. In July 1950 Pfizer had secured a patent on terramycin which it introduced on the market in March 1950. Parke, Davis (a pharmaceutical company not involved in this case either as a defendant or as a co-conspirator) in October 1949 had received a patent for chloromycetin which it had put on the market in January 1949.

In 1952 a new drug, tetracycline, was developed. The activities of the three defendants with respect to this drug create the basis of the indictment's charges.

The Pre-November 1953 Situation

Aureomycin (Cyanamid) was produced and sold exclusively by Cyanamid, was covered by patents (Duggar and Niedercorn fermentation process) and was available to the public from December 1948.

Chloromycetin (Parke, Davis patent) was manufactured and sold to the public from 1949.

Terramycin (Pfizer) was produced and sold by Pfizer from 1950 as the sole manufacturer.

No licenses or cross-licenses were granted by any of these companies to each other or to other drug manufacturers.

Each of these drugs was a prescription drug, namely, available only on a doctor's prescription and although some what interchangeable their sales were dependent upon the doctor's views as to their respective effectiveness in the treatment of the particular ailment of the patient. To this extent they were competitive. Each company, taking advantage of its patents and believing in the efficacy of its product but with full knowledge of the similarity in medical usefulness of its competitors' drugs, kept a competitive eye on the prices of the others and refrained from the issuance of licenses. There had been price stability between aureomycin, terramycin and chloromycetin for several years prior to the alleged conspiracy.

Into this somewhat stable situation in the early 1950s came tetracycline, considered by many as superior to the other three.

Tetracycline

Pfizer claimed that in June 1952 one of its scientists, Dr. Conover, had discovered tetracycline which was obtainable by subjecting aureomycin (patent held by Cyanamid) to a dechlorination process. Application was made in October 1952 for a patent on product and process claims. As a result of publicity of the Pfizer discovery, Cyanamid in March 1953 applied for a product and process patent for tetracycline. Thus there were two pending applications for patents for the same drug. To resolve the conflict, the Patent Office declared an interference.

Briefly stated Pfizer believed that it had priority (Dr. Conover—June 1952) over Cyanamid (March 1953), but the outcome was uncertain. However, Pfizer, even were it to win, was completely dependent for production, upon Cyanamid's aureomycin either by purchase or license to manufacture. In an attempt to resolve these business problems, McKeen of Pfizer and Malcolm of Cyanamid met in November 1953. There is no contention by the government that at the time of this meeting and for the years preceding it there was any conspiracy or agreement despite the similarity of the price structure of the three drugs and despite the companies' policies of not licensing others. Prior to October 1951 price reductions by one were met by the others.

The November 1953 Meetings

None of the business practices of Pfizer or Cyanamid which occurred prior to the November 1953 meetings by the government's own specification were a part of the alleged conspiracy in issue here. If there were any, by the government's concession it was created by McKeen and Malcolm at the November 1953 meetings and not before. Two meetings between Pfizer and Cyanamid were held, the first (McKeen and Malcolm) was somewhat preliminary, the second (McKeen, Malcolm, Powers of Pfizer and Martin of Cyanamid) resulted in written agreements (January 11, 1954). The facts as to these meetings were developed by the government through these four witnesses. The subject matter of the negotiations was the tetracycline patent interference situation. If Pfizer won, its victory could have been hollow because Cyanamid controlled the vital aureomycin unless it reached an agreement with Cyanamid to obtain it. Cyanamid with its aureomycin risked being blocked from making tetra-

cycline by Pfizer's Conover patent. To protect the respective interests of both companies, agreements were reached which provided in substance (1) that the parties exchanged proofs as to priority, the Patent Office being the ultimate arbiter and that the party prevailing should give a non-exclusive license to the other in consideration of a certain royalty, and (2) that Cyanamid would license Pfizer also non-exclusively, to make aureomycin for use in producing tetracycline and to supply certain technical information. Another important item underlying the settlement from Pfizer's point of view was the obtaining of an agreement by Cyanamid to sell Pfizer a large initial quantity of bulk tetracycline to enable Pfizer rapidly to get into the market. Thereafter proofs of priority were exchanged and as a result Cyanamid filed a concession of priority in Pfizer's favor in the Patent Office on February 4, 1954.

The government does not claim that these agreements in themselves were unlawful. Although the happenings at these meetings were developed through extensive examination and cross-examination, there was no proof that these meetings involved prices, the fixing of prices, exclusion of competitors or the licensing of others. The only persons present, in addition to reciting the business reasons for the meetings and to describing at length how the then pending patent interference affected their respective companies, specifically stated that the fixing of drug prices, the exclusion of competitors or the licensing or non-licensing of others had not been discussed and that they had left the meetings as entirely free agents with no understandings of any sort on prices or licensing.

Bristol

Bristol, mindful of Pfizer's and Cyanamid's activities in the tetracycline field, filed in October 1953 its patent application. Although this application was rejected, it filed a separate patentability claim for tetracycline hydrochloride. This claim brought about in March 1954 an interference involving Bristol, Pfizer and Cyanamid. Despite Cyanamid's patent position, Bristol proceeded to manufacture tetracycline by a fermentation process.

Bristol, having learned in February 1954, of the Pfizer-Cyanamid concession of priority whereby it appeared most likely that Pfizer would receive a patent and concerned over a trade paper report that Pfizer would not license any other company than Cyanamid, thus potentially excluding all other competitors, communicated with Pfizer. Pfizer reaffirmed its policy not to license anyone and its intention to bring suit against manufacturers or sellers or tetracycline if in a legal position to do so. Nevertheless, Bristol in mid-1954 agreed to sell to Squibb and Upjohn bulk tetracycline, Bristol being indemnified by them against damages resulting from any infringement suit. Thus, Bristol was subjected to potential patent infringement liability.

The Issuance of the Patent—January 11, 1955

On January 11, 1955 Pfizer received its tetracycline patent and on the same day filed infringement suits against Bristol, Squibb and Upjohn. Bristol with its two essential customers, Upjohn and Squibb, at stake was most anxious to settle the patent litigation, particularly since there were some negotiations for a two-party settlement between Pfizer and Upjohn. To forestall this possibility, agreements were entered into between Bristol and Upjohn and Bristol and Squibb

(November 1955) whereby Bristol assumed control of the patent litigation, Bristol became the indemnitor, no independent settlements with Pfizer were to be made and, if Brisol settled with Pfizer, licenses limited to purchase, use and sale of tetracycline were to be obtained for Squibb and Upjohn.

The Broady Incident

Prior to December 1955 Pfizer had taken an adamant position in refusing to license Bristol. Quite unrelated to tetracycline, the trial of John G. Broady, a lawyer-investigator, had just (November-December 1955) taken place in the New York courts. Broady had been convicted of tapping telephone wires amongst which were those of Bristol and Squibb. Broady apparently had been retained by Pfizer's general counsel. Bristol threatened to use this newly discovered material in the patent litigation. Pfizer was fearful of the adverse publicity if the incident were disclosed. The Broady incident brought about a radical change in Pfizer's attitude and a meeting was quickly arranged between McKeen (Pfizer) and Schwartz (Bristol) to discuss settlement.

The December 14th and 15th, 1955 Meetings

The Broady incident gave to Bristol a trump card which it had not hitherto possessed and Bristol played it boldly. Since the events of these meetings bring Bristol for the first time into the conspiracy, according to the government, they must be examined with care. There were only two principal participants at these meetings, Schwartz (Bristol) and McKeen (Pfizer) and their patent counsel. No evidence of price-fixing, exclusion of competitors, restriction on licenses or the exercise of monopoly power was adduced by the government in its development of what occurred at these meetings. Both McKeen and

Schwartz testified concerning the situation facing both companies as a result of the patent litigation and Schwartz added his indignation over the Broady incident. Agreement, however, was reached and a letter of intent signed (GX 95) which was followed by an agreement executed on March 25, 1956 (GX 50). Bristol requested and received for Squibb and Upjohn licenses to purchase, use and sell (GX 51, 52).

Briefly reviewing the situation up to December 15, 1955, Bristol's policy of setting its prices at the same level as Pfizer, Cyanamid and Parke, Davis, its agreements with Squibb and Upjohn, and its limitation to two bulk customers was concededly legal and not pursuant to any conspiracy.

The government does not claim that the agreement of December 14–15, 1955 was illegal *per se;* in fact it concedes the contrary (BP 7). It further admits that Bristol's actions prior thereto were not illegal. It does stress the absence in the licenses granted of the right to manufacture but in its bill of particulars concedes that Upjohn never sought this right through its bargaining agent Bristol.

Bristol's Post-December 1955 Activities

There was no change in Bristol's practices after the December 1955 meetings. Prices remained as stable as in the years preceding the alleged conspiracy. Bristol reduced its costs drastically in 1954 but made no selling price reduction. As a result of developing a sales force and enabling Squibb and Upjohn to market tetracycline products, Bristol's percentage of the market increased substantially with a consequent diminution of Pfizer's and Cyanamid's shares.

The Trial

The stage had been set in the indictment and bill of particulars for a trial upon the issue of conspira-

torial agreements reached at specific times (November 1953 and December 1955) between specific persons (McKeen-Malcolm; McKeen-Schwartz). The bill of particulars alleged that:

> 27. (a) McKeen and Malcolm personally negotiated the illegal cross-license and bulk sales arrangement between Pfizer and Cyanamid which initiated the conspiracy in November 1953.
>
> • • • • •
>
> (d) McKeen and Schwartz personally negotiated the illegal arrangements in December 1955 which resulted in Squibb and Upjohn being deprived of any right to manufacture tetracycline, in their being required to purchase all tetracycline requirements from Bristol and also resulted in settlement of all litigation with Pfizer involving the validity of the Pfizer tetracycline patent.
>
> (e) McKeen is the person who has been responsible for Pfizer's pricing policy on broad-spectrum antibiotics; Malcolm is the person who has been responsible for Cyanamid's pricing policy on broad-spectrum antibiotics; Schwartz is the person who has been responsible for Bristol's pricing policy on broad-spectrum antibiotics.

Before the openings by counsel, the trial court by way of preliminary instructions had stated to the jury that the conspiracy included "the creation of uniform, non-competitive and unreasonably high prices to the users of broad spectrum antibiotics." In its opening the government had stressed "enormous" profits by comparing factory cost and selling price and gave as an illustration of Cyanamid's 1954 cost a figure of $2.55 production cost for 100 capsules, a 1956 cost of $1.76 and a 1958 cost of $1.59 against a selling price to the druggist of $30.60 and $51 to the consumer.

The government conceded that production cost did "not include such items as research, promotion, advertising, executive overhead and things like that" but asked the jury to consider the significance of low production cost in relation to selling prices. The jury was also told that even in the pre-conspiracy, pre-tetracycline days there were "unreasonably high profits involved."

At the conclusion of the government's opening defendants moved for a mistrial because of its allegedly misleading prejudicial and inflammatory statements as to unreasonably high prices and profits. The motion was denied.

During the early weeks of trial, the government proceeded to offer a vast amount of testimony and scores of exhibits relating to factory production costs and alleged profits. To all of this proof defendants made objections which were overruled and at the end of the government's case they moved to strike all evidence relating to prices and profits during the conspiratorial period (November 1953–September 1961) and during the period prior to 1953 when the conspiracy was conceded not in existence. The motion was denied.

The Government's Summation as to Profits

The government devoted much of its summation to the profits obtained by the respective defendants from their particular drugs (illustrative: "in those seven years Bristol made approximately $57 million in profits"—$69 million, production cost $12 million). "In 1954 it cost Cyanamid $2.26, in 1955 it cost them $1.57. That listed for $51. The druggist paid $30.60—2,000% mark-up. * * * I think it is a fair inference from this chart that Cyanamid and Pfizer and Bristol starting in 1956 were making an unreasonably high profit."

I.

Amongst other grounds defendants seek reversal because they claim that the court in its submission of the issues to the jury departed radically from the indictment's allegations and the bill of particulars as to the formation of the conspiracy. This point is based upon the specification in the bill of particulars that the conspiracy came into existence in November 1953 and December 1955 and that it was the result of meetings between specific individuals. Defendants claim that they rested (except for recalling one witness) at the close of the government's case, expecting the case to go to the jury on that theory. They assert that the court, instead of charging the jury that the conspiracy as alleged must be found within the scope of the indictment and bill of particulars, in fact charged the opposite in instructing that the central requirement of an agreement "does not mean, however, that in order to create an unlawful combination or a conspiracy, the parties must meet together at some time or place or, indeed, that they must meet together at all"; "that proof of a conspiracy does not necessarily require proof of express agreements or proof that the alleged conspirators had any face-to-face meetings at all"; and despite the government's introduction of the written agreements that "This is rarely the way in which criminal conspiracies are formed."

Had the government relied on a general course of conduct throughout the years, these instructions might well have been apposite. But this was not such a case. The vast amount of time taken by the government in stressing high prices and profits and alleged patent frauds, together with the court's charge deprecating the testimony of defendants' officers, may well have succeeded in diverting the jury from the real issues as framed by the indictment and bill of particulars.

Defendants contend that the charge as given cut the government loose from the theory on which it had tried the case and allowed the jury to convict on the basis of conduct during the indictment period without making the essential decision as to whether agreements were actually made at the meetings.

Instead of charging that the government had relied (Bill of Particulars) on specific dates and specified individuals, the court charged that:

> "While the prosecution alleges approximate dates for the commencement of the conspiracy, and charges that the conspiracy continued up to the date of the indictment in August 1961, it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges. If you find all the other elements established, it would be sufficient for Counts 1 and 2 if you found that the conspiracy existed and was continued for any substantial portion of the five-year period ending at August 17, 1961."

Along the same lines were the instructions that:

> This central requirement of an "agreement" does not mean, however, that in order to create an unlawful combination or a conspiracy, the parties must meet together at some time and place or, indeed, that they must meet together at all. Nor does it mean that their undertaking must be embodied in express or formal contractual statements, or express words of any kind.
>
> * * * * *
>
> Because express agreements are neither necessary nor common in establishing unlawful conspiracies the crime is one which may be shown from circumstantial evidence as to a course of conduct or business dealings. In other words, whether the prosecution has sustained its burden of proving a conspiracy must fre-

quently be judged by what the jury finds the parties actually did rather than from the words they used.

* * * * *

Along with all the other evidence in the case, you have heard the sworn testimony of the principal officers of the three defendant companies, and you have heard each of them deny in broad terms that there was any understanding or agreement among them, either express or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. You must, obviously, give due and deliberate thought to this testimony, and ultimately attribute to it such weight as it permits in your impartial judgment. In performing this task, you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter.

To this charge defendants took exception, saying: "We tried the entire case pivoting around those[1] dates and I think it would be a variance against the indictment and the bill of particulars and the contentions of counsel in the opening to leave it in the jury's mind, any doubt if they decide Bristol joined later." Cyanamid and Pfizer joined in the exception to the charge that "it was not essential and not necessary that the precise dates be established."

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[1] November 1953; December 1955: 5011a, 5012a.

Defendants had asked the court to instruct the jury that "The defendants, under the law, were entitled to rely on the Government's bill of particulars, taken together with the indictment, as a fair statement of what the issues in this case are about, and what they are not about." And that "You must evaluate the evidence in the light of the charges made in both the indictment and the bill of particulars. You cannot find any defendant guilty on the basis of some charge not made in the indictment as supplemented by the bill of particulars, nor may you convict on a basis which is different or contrary to the specific charges in the indictment as supplemented by the bill of particulars." (Cyanamid Suppl. Reg. No. 2)

The request was denied.

The government had as part of its direct case called as its witnesses the only key officers of defendants present at the face-to-face critical meetings in November 1953 and December 1955. In their long cross-examination of their own officers, defendants had focused on refuting what the government claimed had happened at the meetings, and then rested on the assumption that the meetings would be treated as an important part of the case. Although in its charge the court spent much time discussing the circumstantial evidence, it slighted and rather deprecated the testimony about the meetings which was vital to any jury decision as to the existence of a conspiracy.

The suggestion by the court that the jury should not reject the testimony of defendants' officers was followed by what might well have been regarded as a skeptical view as to their "assertions of innocence." But the officers had gone far beyond "assertions of innocence." They had testified at length concerning the business problems created by the tetracycline patent situation, how it affected their respective companies

and how settlements instead of long-drawn-out and costly litigations appeared to be the wiser course. Furthermore, the officers' "assertions of innocence" included specific statements that particular subjects had not been discussed and that they had left the meetings as entirely free agents with no understandings of any sort on prices or licensing. To allow the jury to convict without finding that these denials were untrue would free the government from its basic theory of the case and allow it to rely on any understanding that might be inferred from other conduct. When the judge instructed that "assertions of innocence by such officers may reflect partly legal as well as factual contentions," meaning that the officers might be using "agreement" in an overly narrow sense, he was disregarding testimony that no understanding of *any* sort was formed at the meetings, and probably did confuse the jury about what parts of the testimony bore factually on whether a conspiracy had been formed. Thus, in effect, the charge nullified the testimony of defendants' officers as to the business reasons for the intercompany agreements and permitted the jury to infer a conspiracy from afterevents, which were relevant only insofar as they tended to show that an agreement was reached *at the meetings*. The charge not only did not focus the jury's attention on this but may well have led to a contrary view on their part.

A review of the entire charge leaves the definite impression that although the circumstantial evidence and "unreasonably high profits" aspects of the case were stressed, the key issue as to the formation of the conspiracy as particularized by the government was not given proper attention and the importance of establishing a conspiracy as charged so minimized that there can be no assurance that the jury was not misled to defendants' serious prejudice.

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More specifically, one-third of the charge was devoted to such necessary generalities as reasonable doubt, circumstantial evidence, the indictment and the applicable law. Possible fraud on the Patent Office consumed one-quarter and the claim of unreasonably high prices one-sixth. Thus three-quarters of the charge did not relate to the key issue, namely, the formation of the conspiracy as specified in the bill of particulars. Except for mentioning the November 1953 and December 1955 dates, there was nothing in the charge which focused the jury's attention on the primary issue which they were to resolve, namely, did the participants at those meetings conspire to carry out the program as alleged by the government?

In contrast to concentrating on the conspiracy as alleged, the government in its summation and the court in its charge virtually ignored the allegedly conspiratorial meetings. Instead, the patent situation and high prices were stressed.

With respect to the Patent Office proceedings, the case for this purpose was virtually diverted from an antitrust conspiracy case to a patent fraud case.

The government's theory of fraud on the Patent Office, in brief, is based upon the question of the presence of tetracycline in aureomycin. The Patent Examiner had expressed the view that if any identifiable amount of tetracycline were present in aureomycin, a patent would not have been issued to Pfizer. The government claims that to enable Pfizer to obtain the patent, Cyanamid falsely represented to the Examiner that tetracycline was not present and that Pfizer was aware of this collaboration.

The jury were instructed as to the duty of applicants to disclose prior art and other facts material to the allowance of a patent and as to the withholding of information with intent to deceive. They were

asked to resolve the dispute as to "what information was, in fact, of interest to the Examiner and whether the answers to his questions were deliberately unresponsive and misleading." The procedure in the Patent Office was outlined, the scope of patent claims, the way a Patent Examiner proceeded to determine the claims to which an applicant might be entitled, the further steps an applicant might take after rejection, namely, reconsideration or amendment and an appeal after final rejection to the Board of Appeals. All were explained. The evidence before the Patent Examiner was described in detail, including his speculations that the patentees, Duggar and Niedercorn, might have had co-production of tetracycline with aureomycin without recognizing it. As previously stated a quarter of the lengthy charge was devoted to the patent aspects, but nowhere was the jury told in clear language that the Patent Office proceedings were relevant only insofar as the acts of Pfizer and Cyanamid supported an inference that at the November 1953 meetings they had entered into agreements to fix prices or to exclude others.

Towards the end of the charge, ten pages were expended on the relation of allegedly unreasonably high prices. The court charged that "* * * uniform prices, maintained at a constant level over long periods of time—if such prices are artificial and unrelated to supply and demand or to other variations or changes in the pertinent economic factors—may be considered by you as some evidence from which an agreement or understanding or concerted action to restrain trade may be inferred."

The court read to the jury the last three of the "means and methods" charged in the indictment, namely:

1. Pfizer and Cyanamid maintained substantially identical and unreasonably high prices on Terramycin products and Aureomycin products, respectively.

2. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its tetracycline products on the market at prices which were substantially identical with each other and which conformed to the prices of Terramycin products and Aureomycin products in effect as of November 1953, and all these companies maintained such substantially identical and unreasonably high prices until at least July 1960.

3. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its tetracycline products on the market in dosage forms and customer classifications substantially identical with the Terramycin products and Aureomycin product dosage forms and customer classifications in effect as of November 1953, and have continued to use such substantially identical dosage forms and classifications to date.

Referring to the government's contention "that broad spectrum antibiotic sales comprised a major portion of the business, and a major source of the profits, of the defendant companies in varying proportions," the court charged that these assertions "may be considered as part of the general background and setting in which the events of the case transpired." The court told the jury that they could ask themselves "whether price cuts or price changes of any kind would seem to have been indicated or desirable for any of the companies involved from the viewpoint of their self-interest." The court instructed that "neither the Sherman Act nor any other law that concerns us in this case imposes any limit on the price a company may charge for its commodity" and that the jury should not be influenced "by any notion that drug

prices were too high or too low or even just right" and explained its reason for allowing cost and profit data in evidence because thereby the government sought to establish (presumably by inference a conclusion of conspiracy) stability of prices over a long period of time despite a disparity of production costs and market shares amongst the defendants.

Defendants take particular exception to two portions of the charge relating to profits and costs. They say as to profits that the charge that "Unreasonably or extraordinarily high prices or profits charged uniformly by competing sellers over a substantial period of time may be evidence, taken with all the other circumstances of the case, supporting an inference that the parties had an agreement rather than a competitive situation with respect to prices," and was not justified and could well have misled the jury.

As to costs the court charged:

> There has been evidence of so-called "production costs" or "factory" or "standard" costs from records kept by the companies, and comparisons in these records between such costs and selling prices. Many of these records omit many factors that should be included in costs in order to compute net profits. Such factors, without exhausting them, were research, promotion expenses, and other kinds of costs. You should have these omissions in mind and take them into account when you consider the figures I have just mentioned.

This instruction, defendants argue, permitted the jury, without the benefit of any proof of the "many factors that should be included in costs in order to compute net profits" or the factors which defendants have represented as constituting 90% of true cost, to speculate as to what proper costs would have been. The absence of the factors, which the court stated

had been omitted, namely, "research, promotion expenses, and other kinds of costs," gave to the jury they say, without any proof of what the omissions might have been, uncontrolled discretion to keep "these omissions in mind and take them into account when you consider the figures." Defendants contend that with 90% of the material essential to an accurate determination of costs withheld from the jury by exclusion, it was being instructed "to reach its verdict on its own crude lay notions and subjective impressions as to whether prices and profits were 'unusual,' 'artificial,' 'extraordinary' or 'unreasonably high.'"

The jury thus entered upon its deliberations with its attention diverted from the real issues to patent fraud and unreasonably high prices—both inflammatory issues. Quite apart from their relevance, these so-called means and methods could well have so prejudiced the jury that it either failed to resolve the primary issue or subordinated it to the issues stressed. Because of this real possibility, defendants Pfizer, Bristol and Cyanamid are entitled to a new trial.

II

Defendants also seek reversal because the court, after receiving evidence of the marketing practices and policies of Parke, Davis (not a defendant) which was concededly not engaged in the alleged conspiracy, improperly placed restrictions on them by refusing to permit them to argue to the jury the effect of this evidence upon their innocence or guilt. In addition, these defendants claim reversible error in the charge actually given with respect to Parke, Davis' role in the antibiotics field.

Although the court said that "I will allow everybody to risk arguments in summation based on comparisons between the defendants and Parke, Davis," it ruled

that "I will sustain objections to arguments based on the legal notion of the presumption of innocence which I think has no place in that discussion and I think it would be an incorrect legal approach to the subject. * * * because I don't think you should be asking the jury to draw any inferences from the presumption of innocence relating to a party which is not on trial." The ruling was broadened by the court's excluding reference to "a presumption that business is conducted lawfully."

Parke, Davis during the critical years of the alleged conspiracy manufactured and sold the antibiotic, chloromycetin. It was the second largest in the antibiotic field, accounting for some 24% of all sales. In the years preceding the alleged conspiracy, its prices paralleled those of the other companies. It had never licensed others under its patent and had never made bulk sales. The government not only conceded but affirmatively stated "on the record" that Parke, Davis was not a conspirator. Naturally defendants sought to capitalize on the fact that Parke, Davis, as a non-conspirator, engaged in the same marketing practices which the government charged created a beyond-reasonable-doubt inference of conspiracy on their part.

The court instructed the jury that "Parke, Davis is not alleged to have been a member of the conspiracy charged by the government" and that they could take into account Parke, Davis and its activities insofar as they were material factors but then said:

> However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here, and the verdict concerning the defendants which are on

trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom.

The evidence as to Parke, Davis' conduct was all-important to the defendants. The government had introduced at length proof as to Parke, Davis' practices and policies during the period preceding, and included in, the indictment. A stipulation of facts stipulated that Parke, Davis had a patent on its antibiotic, chloromycetin; that "Prior to August 17, 1961, Parke, Davis did not grant any licenses under its Chloramphenicol (chloromycetin) patent"; that "Parke, Davis made no bulk sales of Chloromycetin." Similarity of price structure intentionally adopted for business reasons was also established.

The charge as given could well have had the effect of stressing the failure to indict, thus carrying the connotation that Parke, Davis might have been guilty but was not indicted for undisclosed reasons. Furthermore, in limiting the jury's consideration to the "Evidence relating to them [defendants] * * *," the court lessened, or might have foreclosed the giving of, any weight which the jury might have attributed to the evidence of Parke, Davis' conduct.

Exception was taken, counsel saying:

> * * * we believe that the juxtaposition of these two charges has the effect of informing the jury that they are not to consider the fact that Parke, Davis followed parallel conduct in many aspects of the marketing of an interchangeable drug as a basis for an inference that such conduct was innocent.

Cyanamid had endeavored to bring the similarity of Parke, Davis' non-conspiratorial business activities before the jury in its request that the jury be instructed:

You have heard counsel from time to time throughout the trial refer to what Parke, Davis did and did not do, and there has been evidence admitted as to Parke, Davis' actions, including the testimony of Mr. Loynd its former chief executive officer and facts as to Parke, Davis which were stipulated between the Government and defendants. Although Parke, Davis was neither indicted nor claimed to have been a co-conspirator in this case, evidence of its actions and its relative size in the broad spectrum antibiotics market is relevant and should be considered during your deliberations.

The evidence is undisputed that Parke, Davis had a patent on its broad spectrum antibiotic product, Chloromycetin, and that during the period covered by the indictment it granted no licenses under that patent and it did not sell Chloromycetin in bulk. It is an undisputed fact that during the period 1954–1961, Parke, Davis' sales of Chloromycetin accounted for 23.8% of sales in the broad spectrum antibiotics market alleged in the indictment, and Parke, Davis was the second largest seller in that market during that time. There is also evidence that Parke, Davis during most of the period covered by the indictment had substantially the same prices on its Chloromycetin products as defendants had on comparable dosage forms and package sizes of the broad spectrum products which they sold.

You are entitled to consider the extent to which the evidence may show that Parke, Davis engaged in conduct which the Government claims proves conspiracy, and the further fact that no one claims that this conduct by Parke, Davis was pursuant to the conspiracy claimed by the Government.

Had defendants been allowed to argue without restriction the full effect of the Parke, Davis marketing policies and procedures, defendants could have

stressed that Parke, Davis quite independently of any conspiracy had paralleled defendants in its pricing and licensing practices both before and after the commencement of the alleged November 1953 conspiracy. The interest of the jury in Parke, Davis was evidenced by requests during their deliberations on two occasions for Parke, Davis evidence.

The restrictions placed upon defendants with respect to the Parke, Davis proof and the failure to present to the jury the substance of defendants' requests to charge constitute sufficient prejudice as to require a new trial.

III.

The Licenses to Squibb and Upjohn

The government placed great importance in support of its conspiracy-to-exclude argument upon the transactions between Bristol, Squibb and Upjohn in November 1955 and the Bristol-Pfizer agreements in December 1955. The conclusions, implications and inferences which the jury might draw from these agreements, of necessity were guided, and controlled by the court's instructions as to the legal effect of the agreements. Depending upon the court's construction of the consequences of the agreements, the jury would enter upon its deliberations as to whether they supported, or were indicative of, the indictment charges.

The situation in November 1955 vis-a-vis Bristol, Upjohn, Squibb and Pfizer was (1) outstanding contracts for the sale of bulk tetracycline by Bristol to Squibb and Upjohn; (2) an infringement suit by Pfizer against Bristol, Squibb and Upjohn; (3) extreme concern by Upjohn over its potential liability to Pfizer, which concern caused Upjohn to explore with Pfizer the possibility of a separate settlement; (4) Bristol's efforts to avoid a separate settlement;

and (5) Bristol's consummation of the bulk sales agreements with Upjohn and Squibb.

These agreements (November 3rd and 18th) with Upjohn and Squibb respectively looked towards a hoped-for settlement between Bristol and Pfizer and in anticipation provided for a license in any such settlement from Pfizer to Upjohn (and to Squibb) which license "may, however, be limited to your right to purchase, use and sell tetracycline to the drug trade."

However, the propriety of these contractual arrangements is not questioned by the government as to Bristol. Thus in its summation the government said: "until the time they made that deal—Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal."

The pre-December 1955 transactions, however, were by no means excised from the case because the government proceeded to argue that the "restrictive arrangement" in the November 3, 1955 agreement had a sinister connotation, and was a part of Bristol's scheme to hold Upjohn and Squibb more securely as purchasers of its bulk tetracycline. The government even brought Pfizer into the picture by imputing that the licenses to sell and use was a Bristol-Pfizer plan to restrict Upjohn and Squibb.

Instead of instructing the jury that the concededely legal November 1955 Bristol-Upjohn-Squibb agreements could not be considered a part of any conspiracy, or, charging, as requested by Bristol that:

> The fact that Pfizer agreed to Bristol's request that Pfizer give to Upjohn a license to purchase, compound, use and sell tetracycline, does not amount to an agreement or understanding by Pfizer with Bristol under which

Pfizer promised not to grant manufacturing rights to Upjohn. Bristol's Request No. 32A. the court not only failed to give such instructions but by its actual charge gave its own, and in our opinion incorrect, interpretation of the agreements.

After referring to the government's contention that there was a restriction forbidding manufacture by Squibb and Upjohn, the court charged that "The critical inquiry on this score is whether the limitation on Squibb and Upjohn, which barred them from manufacturing, was the particular objective of Bristol and was an agreed objective between Bristol and Pfizer in the issuance of that license."

The agreements, however, disclose that there was nothing therein which barred them [Upjohn and Squibb] from manufacturing or which forbid manufacture. In fact there were no restrictive phrases whatsoever. Bristol undertook affirmatively *if* the patent litigation were settled "(2) to secure for you [Upjohn] a direct license under said patent which *may*, however, be limited to your right to purchase, use or sell tetracycline. * * *" (GX 108) (emphasis supplied). The possibility of securing a license to "purchase, use and sell" is a far cry from an undertaking forced upon Upjohn and Squibb by Bristol and Pfizer which forbade and barred manufacture. Any bar, which there might have been, would have been the natural legal consequence of Pfizer's patent. All that the licenses accomplished was to lessen the patent restrictions. The court, having incorrectly assumed that this bar existed, submitted to the jury the question of "whether the limitation on Squibb and Upjohn, which barred them from manufacturing * * * was an agreed objective between Bristol and Pfizer in the issuance of that license." The jury, in being so advised, might well have concluded that the

December 1955 Bristol-Pfizer agreement was, in fact, a bar which violated the antitrust laws and that Bristol and Pfizer had collaborated in imposing restrictions which otherwise did not exist.

Furthermore, the term "restriction" was used alternately to characterize the licenses and to describe what Pfizer and Bristol were forbidden to agree on. The net result was that the charge might be read to contain this syllogism: Pfizer and Bristol were forbidden to agree to restrict licenses to others; the licenses given imposed restrictions on Squibb and Upjohn; Pfizer and Bristol agreed on those licenses; therefore, Pfizer and Bristol did what they were forbidden to do. But there was nothing illegal in Bristol's November 1955 undertaking to try to obtain from Pfizer purchase, use and sell licenses for its customers, Upjohn and Squibb. When Bristol and Pfizer met a few weeks later and concluded their settlement, Bristol's contractual obligation was to secure for Upjohn and Squibb the licenses to which the parties had agreed, namely, purchase, use and sell. It was scarcely Pfizer's duty to insist upon Bristol broadening the type of license requested. Except for the abortive independent attempt on Upjohn's part to explore settlement possibilities directly with Pfizer, there was no proof that the right to manufacture was asserted as a prerequisite condition in connection with either the November 1953 or the December 1955 agreements.

And finally, Squibb and Upjohn did not need licenses as a matter of law to sell tetracycline which they purchased from Bristol, a licensed manufacturer.

IV.

Bristol's participation in the tetracycline race is highly significant. It can be construed, as Bristol

would have it, as evidence of a very competitive situation, with Bristol determined to assert a position in the field, or upon the government's theory, as proof of acts from which an inference of conspiracy with Pfizer and Cyanamid can be drawn.

The indictment had charged that the "combination and conspiracy was effectuated by various means and methods including, but not limited to, the following:" Twelve subsections are set forth. Those referring to Bristol are:

"(a) Cyanamid licensed Pfizer and Bristol to use its Aureomycin patent in the manufacture of Tetracycline and refused to license all other applicants."

"(b) Pfizer licensed Cyanamid and Bristol under its Tetracycline patent and refused to license all other applicants."

"(d) Pfizer, Cyanamid and Bristol suppressed litigation involving the validity of Pfizer's Tetracycline patent."

"(e) Pfizer and Cyanamid and Bristol.* withheld pertinent and material information from the Patent Office and otherwise misled the Patent Office prior to the issuance of Pfizer's Tetracycline patent.

"(g) Bristol sold bulk Tetracycline only to Upjohn and Squibb. * * *"

"(h) *Bristol entered* into agreements with Upjohn and Squibb respectively which required Upjohn and Squibb to purchase all their requirements of bulk Tetracycline from Bristol."

"(k, l) Pfizer, Cyanamid, Bristol, Upjohn and Squibb introduced their Tetracycline products on the market at substantially identical prices and all maintained such prices until at least July 1960."

The government offered proof in support of these means and methods. All, however, preceded the date

*Charges withdrawn as to Bristol.

upon which Bristol is alleged to have entered the conspiracy. Specifically, the Cyanamid license was received in January 1955, Bristol's bulk sales to only Squibb and Upjohn commenced in September 1954, the requirement contracts were in November 1955, and marketing at substantially identical prices started as early as May 1954.

Although the efficacy of instructions limiting this evidence against Bristol at the time of receipt is questionable, its harmful effect upon Bristol could only have been minimized by the clearest instructions that the jury should not consider Bristol's part in any of the events prior to December 14–15, 1955 as proof of Bristol's being in any conspiracy. Failure so to charge plus the affirmative charge that "it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges," could well have caused the jury to believe that Bristol was involved in a conspiracy long before December 14–15, 1955. A comprehensive charge as to these prior events became all the more important because the government, in effect, had put its stamp of legality on identity of price and restricted bulk sales. It was thus incumbent upon the government to prove beyond a reasonable doubt by some reverse alchemistic process that acts which had been legal had by some action taken at the December 14–15 meetings been changed merely by continuance into acts thereafter illegal.

There was no direct proof of conspiracy to be found in the Schwartz-McKeen versions as developed extensively on direct and cross-examination relating to the December 14–15, 1955 meetings. Nothing illegal is to be found in the written agreements embodying the understandings reached. But, in a case so wholly dependent for conviction upon the jury's drawing of

inferences in direct contrast to the statements of the witnesses present and the documents evidencing their agreement, the importance of instructions cannot be overemphasized. An appellate court has no means of knowing what factors were decisive in the jury's collective mind in reaching their verdict. However, here we can say that failure to differentiate between the legal and the illegal was prejudicial error.

In conclusion, the government elected to make specific charges of agreements made at specific times between specific individuals which agreements, it alleged, constituted the conspiracy to do the illegal acts charged in the indictment and bill of particulars. The case, as tried, covered practically every phase of the development and marketing of the four so-called wonder drugs, aureomycin, chloromycetin, terramycin and tetracycline over a period of more than ten years.

Probably, of necessity, the government virtually had to ignore or at least play down the business reasons asserted by the defendants' executives as motivating their agreements and the actions taken by them and to concentrate on the possibly more jury appealing aspects such as abnormally high prices and profits and patent fraud. It was from such proof that the jury was asked to infer conspiratorial agreements which the government had not established through the principals at the November 1953 or the December 1955 meetings or through the written agreements themselves except as read in connection with other facts.

Under these circumstances it was highly important that the jury's attention be directed in the charge to the primary issue framed by the government. But as the case was submitted to the jury, this issue was subordinated in government summation and charge to the more inflammatory issues of illegally exorbitant prices

charged to a victimized public and patent fraud. But the conspiratorial agreements, as charged, did not emanate from these issues.

A review of the entire record leads to the conclusion that the judgments of conviction against Cyanamid, Pfizer and Bristol must be reversed and that a new trial be had as to them.

HAYS, Circuit Judge (dissenting).

I respectfully dissent.

1. *General*

"On appeal from the convictions the evidence is to be viewed in the light most favorable to the government and all permissible inferences are to be drawn in its favor. United States v. Kahaner, 317 F.2d 459, 467 (2d Cir.), cert. denied, 375 U.S. 836, 84 S.Ct. 74, 11 L.Ed.2d 65 (1963); United States v. Hall, 346 F.2d 875 (2d Cir.), cert. denied, 382 U.S. 910, 86 S.Ct. 250, 15 L.Ed.2d 161 (1965); United States v. Marchisio, 344 F.2d 653 (2d Cir. 1965)." United States v. Jones, 374 F.2d 414, 419 n. 2 (2d Cir.), cert. denied, 389 U.S. 835, 88 S.Ct. 40, 19 L.Ed.2d (1967). Although the evidence against appellants is not overwhelming, viewed in the perspective of our limited scope of review it is sufficient.

The indictment charged defendants, in three counts, with having combined and conspired in restraint of trade in the broad spectrum antibiotic market, with having combined and conspired to monopolize that market, and with having illegally monopolized it. It was alleged that defendants conspired to exclude competitors and to fix prices and that, having sufficient market power to do so, defendants succeeded in accomplishing the objects of their conspiracy.

The government's evidence establishes that the price of tetracycline, a broad spectrum antiobiotic controlled

by defendants and having a very large sale, did not change at all from 1953 until 1960. Throughout that whole period each defendant charged exactly the same amount although Pfizer and Cyanamid were consistently producing tetracycline at a cost substantially lower than the production costs of Brisol, Squibb and Upjohn. Pfizer and Cyanamid allowed themselves to lose significant portions of their market to the higher cost producers without ever attempting to regain those portions by cutting prices. Although the production costs of all producers markedly decreased, the resulting savings were not reflected by any price reductions.

The agreement to exclude competitors centers on the 1953 patent settlement between Pfizer and Cyanamid. Pfizer licensed Cyanamid to produce and sell tetracycline while Cyanamid licensed Pfizer to manufacture, though not to sell, aureomycin. Neither Pfizer nor Cyanamid, then, with Parke-Davis, the only producers of broad spectrum antibiotics, had previously licensed any other drug companies to produce or sell their respective broad spectrum antibiotics. The government presented evidence from which the jury could infer an agreement between Pfizer and Cyanamid that Pfizer would not license anyone other than Cyanamid to manufacture tetracycline. Shortly after their meeting at which the parties had the opportunity to discuss such an agreement Pfizer publicly announced that the company policy was not to issue any licenses for tetracycline. That policy was strongly impressed upon Bristol, Squibb and Upjohn, and almost certainly would have resulted in litigation had the Broady wiretap incident not intervened. The point at which the understanding between the parties merged into an agreement is, perhaps, difficult to define with precision, but this constitutes no

reason for denying to the jury the power to conclude that such an agreement existed.

2. The Issues of Patent Fraud and Unreasonably High Prices

The court's instructions on the issues of patent fraud and unreasonably high prices were entirely proper. The evidence introduced on these issues tended to support the charge of conspiracy.

The government did not contend that Pfizer and Cyanamid agreed to defraud the patent office, but only that their conduct was evidence of the underlying conspiracy to exclude competitors. The jury would have been justified in finding that Pfizer's statement to the patent office that the processes of the prior art produced no tetracycline was deliberately false and that it was made in the expectation that Cyanamid would not challenge the statement. Cyanamid's participation in such a course of conduct is readily explainable by its expectation that it would be Pfizer's sole licensee.

The evidence relating to the high price level for broad spectrum antibiotics was equally relevant to the issue of conspiracy. There was evidence that the price for the antibiotics remained the same notwithstanding differences in costs among the defendants, notwithstanding overall decreases in costs through the period of the conspiracy, and notwithstanding changes in the market percentages controlled by each defendant. The jury would be justified in finding that the failure of any defendant at any time over a period of seven years to lower these extremely high prices evidenced a conspiracy. Defendants attempted to convince the jury that the oligopolistic nature of the broad spectrum antibiotics market made the ordinary

concept of a competitive market irrelevant. The jury was not compelled to accept defendants' representations, and we are not justified in questioning its refusal to do so.

The government's substantial evidence as to the level of profits enjoyed by defendants from the sale of broad spectrum antibiotics was also relevant on the issue of conspiracy. Its relevance lies in the fact that, when profits were so enormous, defendants could have been expected, in the absence of a conspiracy, to experiment with price reductions in an effort to increase percentage of sales.

Defendants also complain that the evidence was improperly admitted because the government introduced no evidence of comparative prices from which the jury could properly conclude that defendants' profits were unreasonably high. The government did introduce evidence relating to the profits realized by the drug companies on penicillin and on other drugs. The evidence shifted the burden to defendants to convince the jury of the inapplicability of the standards suggested by the government.

Defendants argue that the jury was given an erroneous impression of their level of profits by the introduction of evidence relating to production costs rather than to total costs. Defendants had it within their power to introduce their own evidence on costs. The relevance of production costs was clearly established by the government's showing that defendants relied on production cost data both in internal memoranda and for establishing the industry-wide "rule of thumb" price level of approximately three times production costs.

3. *Parke, Davis*

The jury was instructed that the evidence concerning Parke, Davis was part of the total evidence that it should consider in reaching its verdict. It was then told, however, that "the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here * * *" It is claimed that the effect of this instruction was to detract from the force of the testimony concerning Parke, Davis. The defendants' theory is that Parke, Davis, which was not indicted, conducted its activities in the same manner as defendants and the accused co-conspirators, and that the jury should consider, therefore, whether defendants had not in fact been acting consistently with good business practices rather than with a conspiracy. The construction that defendants place on the charge is a possible construction but, in terms of the charge as a whole, that possibility seems hardly serious enough to warrant reversal.

4. *Licenses to Squibb and Upjohn*

The jury was instructed that "[t]he critical inquiry on this score is whether the limitation on Squibb and Upjohn, which barred them from manufacturing, was the particular objective of Bristol and was an agreed objective between Bristol and Pfizer in the issuance of that license." The instruction might have been construed by the jury to mean that but for the restriction Squibb and Upjohn would have had the right to manufacture tetracycline, whereas in fact there would have had to be a specific grant of permission.

It seems to me to be quite unlikely that the jury was seriously misled by this instruction. The settle-

ment did not grant Squibb and Upjohn the right to manufacture, and the real issue was whether Pfizer had declined to grant that right at Bristol's request.

5. *Bristol*

Bristol settled on its own behalf and on behalf of Squibb and Upjohn their suits against Pfizer and Pfizer's suits against them. In the settlement Bristol obtained licenses to manufacture and sell tetracycline, while Squibb and Upjohn obtained licenses which prevented them from making bulk sales.

The restriction imposed on Squibb and Upjohn precluding the resale of bulk tetracycline suggests an agreement to exclude competitors. In addition, the circumstances of the settlement—including the private discussion between McKeen and Schwartz (allegedly about the Broady wiretap incident about which all the other participants in the meeting already knew anyway)—were sufficient to justify the jury in finding that the parties agreed upon the desirability of keeping as small as possible the number of manufacturers and therefore granted Squibb and Upjohn only the minimal license that would satisfy Bristol in its settlement with Pfizer.

I would affirm the judgment.

APPENDIX B

Docket Nos. 32493–95

UNITED STATES OF AMERICA, APPELLEE

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY, APPELLANTS

Order Granting Rehearing in Banc

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for appellee.

Upon consideration thereof, and a majority of the active circuit judges concurring, Chief Judge Lumbard recusing himself, it is

Ordered that said petition be and it hereby is granted.

The parties may have until November 30, 1970 within which to exchange briefs, and the court will sit in banc and hear argument on December 15, 1970, at 2:30 P.M.

STERRY R. WATERMAN,
Acting Chief Judge.

NOVEMBER 12, 1970.

APPENDIX C

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA, APPELLEE

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY, APPELLANTS

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

On April 16, 1970, a panel of this court filed opinions on the appeal taken from judgments of conviction entered herein against the defendants-appellants, Judge Moore, with whom Judge Friendly concurred, writing for reversal, Judge Hays writing for affirmance. On May 21, 1970, the United States of America, as appellee, filed its petition for rehearing and rehearing *in banc*. Briefs on behalf of the States of California, Hawaii, Kansas, North Carolina, Oregon, Utah and Washington were thereafter filed, upon leave granted, in support of the petition.

In accordance with our practice, the petition was submitted to the original panel for decision on the rehearing. Prior to any decision by the panel, a vote of the Judges (Chief Judge Lumbard having disqualified himself) indicated that on the basis of the panel opinion with respect to rehearing as it then stood, five Judges favored an *in banc* hearing and

three were opposed. An order granting an *in banc* hearing was entered on November 12, 1970.

Discussion thereafter continued among the Judges as to the content of the proposed panel opinion on the rehearing. As a result, the proposed panel opinion was modified to read as follows:

"MOORE, *Circuit Judge* (with whom Judge Friendly concurs):

> "The Government has sought rehearing of our direction of a new trial in this case. See 426 F. 2d 32. Its petition expresses particular concern with parts of Section I of the opinion, notably pp. 38–39, which it considers cast doubt on the time-honored practice of establishing an anti-trust conspiracy by circumstantial evidence. We intended nothing of the sort, as witness the sentence, "Had the Government relied on a general course of conduct throughout the years, these instructions might well have been apposite." We proceeded rather on the basis that the Government had limited itself in this case by paragraph 27 of the bill of particulars quoted at pp. 37–38.
>
> The petition for rehearing argues with considerable force that in arriving at that conclusion we failed to take adequate account of other portions of the bill of particulars and record. On reconsideration, we believe that the Government's point is well taken and we do not rely upon the express agreement contention as a ground for reversal. However, the Government misconceives our opinion in concluding that a different result would follow if we agreed with its argument. For as we indicated in our opinion, the other errors specified, when taken as a whole, were sufficient to deprive the defendants of a fair trial. When we have been so meticulous in protecting defendants' rights against possible prejudice in the jury room—even to the possible (and frequently speculative) effect of curtail-

ment of cross-examination (*see United States v. Padgent*, decided October 15, 1970, 1969-Term, Slip Op. p. 4453 and *United States v. Wolfson et al.*, decided November 11, 1970, 1968-Term, Slip Op. p. 4043)—it seems impossible to deny that the treatment which the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment. When added to this there are the sections of the charge with respect to the testimony of the officers of the companies concerning the meetings of November 1953 and December 1955, pp. 39–40, the undue emphasis on the excess of selling prices over factory costs and the pattern which the trial took, it would indeed be difficult for an appellate court to say that these items may not have affected the jurors' votes in a criminal case so close as this.

If we did not believe reversal on these grounds to be required, we would be obliged to consider many other contentions advanced by the defendants. One of the most persuasive of these is Bristol's argument that there was insufficient evidence to warrant submission to the jury of the issue whether that company had conspired with Pfizer and Cyanamid to exclude others from the tetracycline market. If that be so, and we now incline to that view, a new trial would be required since the charge permitted a guilty verdict if the jury found either a conspiracy to exclude competitors or a conspiracy to fix prices. *Nash* v. *United States*, 229 U.S. 373, 379–80 (1913).

On this basis the petition for rehearing is denied.

HAYS, Circuit Judge, dissenting:

I would grant the government's application for rehearing.

This opinion of the panel which substantially limits the precedential effect of the opinion of April 16,

1970, is being filed simultaneously herewith. Upon a recanvass of the Judges who previously voted upon the *in banc* issue, four Judges, upon the basis of the foregoing opinion, vote to deny an *in banc* hearing and three Judges vote to grant the petition. The votes no longer include that of Judge Waterman who has assumed senior status in the interval.

Accordingly, upon the filing of the panel opinion as hereinabove set forth, it is ordered by a majority of the active judges eligible to vote thereon that the *in banc* order of November 12, 1970, be vacated and that the appellee's petition for a rehearing *in banc* be denied.

HENRY J. FRIENDLY,
Acting Chief Judge.

DECEMBER 1, 1970.

APPENDIX D

Charge to the Jury

The Court. Mr. Foreman, Mrs. Fields, gentlemen: The evidence, which I have just reminded you and will remind you again represents the bounds of the factual material on which you are to study and deliberate, is all in. You have heard the arguments of very able counsel urging the different inferences and conclusions they wish you to draw from that evidence. It is my duty to now instruct you on the law. It is your duty to follow and apply these instructions. Then, exclusively upon the evidence and under these instructions, it is your critical and vital function to determine the facts and seek a verdict.

As counsel and I have repeatedly mentioned, you are the sole and exclusive judges of the facts. You alone determine the weight of the evidence, the credibility of the witnesses, and the reasonable inferences to be drawn from the evidence. The things said by the lawyers and by me are not evidence. Neither the arguments of counsel nor any statements of mine can determine the facts you are to find. While I will be discussing some of the evidence with you in the course of this charge, your own recollection of the facts and your ultimate judgment as to where the truth lies will ultimately control the case.

Now, before turning to the specific charges and issues in this proceeding, I must remind you of certain and basic principles that you should have in mind as you proceed to your deliberations.

First, I remind you that the government as a party is entitled neither to greater nor to lesser consideration than any other party in a case in a court of law. All parties stand in this court as equals, entitled to equal justice. That same thought applies to individuals or corporations, to the rich and to the poor. Under your oath and under the assurances you gave before you were sworn as jurors, it can make no difference that the defendants here are corporations and presumably profitable corporations. They stand before you with the same rights and obligations as any other parties in the federal court.

Remember, too, that it is not for any of us—judge or jury—to make judgments of personal taste or preference concerning the governing law. It is not for me, in giving these instructions, to editorialize upon that law. I must seek to convey it to you as it comes to me from the Constitution, the Congress and our higher courts. You must receive it and heed it faithfully. These thoughts are part of the fundamental principles that ours is a government of laws, not of men.

Now, I have mentioned more than once, and just a few minutes ago, and I will repeat it not only because it is in this text I have written for myself but because it is fundamental, that your findings must rest exclusively upon the evidence lawfully before you. That evidence consists of sworn testimony and exhibits plus a number of facts which have been stipulated and are thus to be taken as true and undisputed for purposes of this case. I have mentioned repeatedly that a question standing alone is not evidence. If a question was asked and an objection to it sustained the question has no significance for your purpose. Similarly, you will recall instances where a question was asked and answered and then, on motion of counsel the answer was stricken. In such cases,

you must rule out of consideration anything that was ordered to be excluded from the evidence.

The fact that questions may have been asked by me is not meant to be, and should not be considered, a matter of any special significance to you one way or the other. Such questions are only part of the overall effort to elicit facts for your consideration. It is those facts as you will find them from the evidence that are important in the end.

I have told you, and I say again, that the evidence and these instructions must be the exclusive materials for your judgment if you are to arrive at a fair and just verdict. Things you have read in the newspapers or heard on TV or on the radio or from people outside this courtroom have no place here and must play no part in your deliberations.

It should make no difference in your judgment of the facts how often or how seldom or on what grounds any particular lawyer may have interposed objections or legal arguments of one kind or another. As a matter of fact, you probably have been aware that for a case of this size, with so many lawyers involved we have had a remarkably orderly and carefully conducted trial. But I have told you before, and I remind you now, though I think it is absolutely needless, that your attempt to discover the truth should not be concerned in any way with views about how any particular lawyer may have conducted his responsibilities, and they were the responsibilities of these lawyers, during the course of the trial.

In a few minutes I will be summarizing the charges against the three defendants as they are presented in this case. I have told you—you knew before I told you—that the charges are brought by means of an indictment under the constitutional and normal procedure for criminal cases. I emphasize once again

that an indictment is nothing more than a set of written charges, and the fact that an indictment has been returned should have no weight as evidence whatever in your consideration. It is no evidence of guilt; it does not in itself create even a suspicion of guilt; it is merely a complaint that informs the defendants, the Court and the jury of what the prosecution alleges.

The same is true of the bill of particulars to which you have heard references. That is merely a document which makes more specific and gives more details about the accusations in the indictment. All of these statements are simply accusations, not evidence that the accusations are true.

The defendants have responded to the charges by pleas of not guilty. This places upon the government the burden of proving their guilt, if any of them are to be found guilty, beyond a reasonable doubt. This is a burden that never shifts; it remains with the government throughout the entire trial. The question whether that burden has been sustained does not depend upon the number of witnesses or the quantity of testimony, but rather on the nature and quality of that testimony as it affects your total judgment.

As a corollary of the government's burden of proving guilt beyond a reasonable doubt, it is the law that the defendant does not have to prove his innocence. On the contrary, the defendant is presumed to be innocent of the charges stated in the indictment. That presumption exists in the defendants' behalf at the outset of the trial, and it continues throughout the trial. It is a presumption in favor of these defendants as I instruct you now, and it will remain in their favor as you proceed to your deliberations in the jury room. The presumption of innocence alone is sufficient to

acquit unless you, the jury, are satisfied beyond a reasonable doubt of the guilt of any defendant from all the evidence in the case.

Armed with the presumption of innocence, a defendant is under no duty to produce any evidence whatsoever. A defendant may rely upon the position that the prosecution has failed to sustain its burden or may rely upon evidence introduced in cross-examination of witnesses called by the prosecution. The question, now that the evidence is in, is whether the government has proved beyond a reasonable doubt each element of any or all the offenses charged in the indictment.

Because of the basic requirement in a criminal case of proof beyond a reasonable doubt, you must have clearly in mind what we mean by those words "reasonable doubt." To a large extent, the words are self-explanatory. But they reflect a key and basic concept and hence some definition and some elaboration is essential.

When we speak of a reasonable doubt, we mean, of course, a doubt that has some basis in reason, a doubt that remains with you after your consideration of all the evidence in the case. It is a doubt that may arise from the evidence that has been produced, or from a lack of evidence. It is a doubt that has some substance. It is frequently said, and I repeat in this charge, that it is not merely a whim, or a caprice, or a speculation. Proof beyond a reasonable doubt does not mean proof to a mathematical certainty or proof beyond any conceivable doubt whatsoever. If it meant that, there could almost never be a conviction in any criminal case. On the other hand, evidence which is sufficient only to arouse or create a mere suspicion is not adequate proof in a criminal case, no matter how strong the ground or basis for the suspicion.

A reasonable doubt in our context means a doubt of the kind that would cause you to hesitate to act in the grave and important affairs of your own life. If such a doubt remains with you after your fair and impartial consideration of all the evidence in the case, then you must find any defendant with respect to which you have such a doubt not guilty.

In other words, if you have considered the evidence and find that you are not satisfied of the guilt of any defendant, if you do not have an abiding conviction, amounting to a moral certainty, of the defendant's guilt, then you have a reasonable doubt and it becomes your duty to acquit.

Conversely, if, after you have fairly and impartially considered all the evidence, you can say that you do have an abiding conviction of a defendant's guilt, the kind of conviction on which you would be willing to act in your own grave and important affairs, if you have that kind of conviction, amounting to a moral certainty, then you have no reasonable doubt, and it becomes your duty to convict. A reasonable doubt cannot arise merely from sympathy for a defendant or a desire to avoid performance of an unpleasant duty.

Now, as you have heard repeatedly, the government's attempt to sustain the burden of proof on its basic conspiracy charge rests entirely upon circumstantial evidence, and it is necessary to say some general things about that now and some more specific things later on.

You undoubtedly know that there are, generally speaking, two types of evidence from which a jury may be asked to find the truth as to the facts of any case. One is what we call direct evidence, such as the testimony of an eyewitness to some ultimate fact in the case. The other is indirect or circumstantial

evidence, meaning the proof of one or more circumstances pointing to the existence or non-existence of some ultimate fact. The two kinds of evidence are commonly used by all of us in our daily lives, outside the courtroom as well as inside.

But it can do no harm, even though it may be unnecessary, to stop for an extra minute and suggest a small example of the difference between these two kinds of evidence.

If it were an ultimate fact in some case, and I take an ultimate fact that has nothing to do with this case, if it were the ultimate question whether it had been raining on some particular occasion, a party might produce a witness who testified that he was out-of-doors at that time and through his senses saw and felt that it was raining. Such testimony would give you direct evidence of that ultimate fact or question about whether it was raining.

On the other hand, and this is a lawyer's kind of hypothetical, one or more witnesses might testify that they were indoors where they couldn't see outside and couldn't know directly by their senses whether it was raining or not but that they saw people entering the place where they were, carrying dripping umbrellas and wearing wet rain gear. Such evidence could serve as circumstantial evidence of the ultimate fact or question was it or was it not raining.

Either kind of evidence might or might not satisfy you as to the ultimate fact in issue and that would depend, amongst other things, on whether you found a particular witness or witnesses capable of reporting accurately and intending to report to you truthfully what they had observed. From either of the kinds of evidence I have described, you might equally find it was or was not raining, depending both on how

you appraise the witnesses and on all the circumstances in that particular hypothetical case.

The principle to be noted here is that circumstantial evidence, when it is admitted into the record, is entitled to the same kind of consideration by the jury as direct evidence. It is not on any different or lower plane. It deserves such consideration as you in your judgment may think it deserves.

No greater and no lesser degree of certainty is required when the evidence is circumstantial than when it is direct. In either case the jury is to follow the test of reasonable doubt as I have undertaken to give it to you.

I postpone now some further general principles about which I will have to talk later on and turn to the allegations of the indictment before us. That indictment, as you know, contains three specific charges against each of the three defendants on trial. The charges are laid under the law of the United States known as the Sherman Act. Before I quote the words of that statute, let me remind you to have in mind that each count charges a separate offense and that the guilt or innocence of each defendant, although they have been tried together, is to be determined separately and distinctly on each of the three counts.

The Sherman Act in two short sections states the substantive law applicable to this case and I will read those for you in their pertinent parts.

Section 1 of the Act says this:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is declared to be illegal. Every person who shall make such contract or engage in any such combination or conspiracy shall be guilty of a misdemeanor.

Section 2 reads this way:

> Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor.

I mention, to dispose quickly, of one or two points under the statute, first, it is not disputed that when the statute refers to a person, it includes corporations such as the defendants here on trial.

Secondly, it is stipulated that the defendants were at all pertinent times engaged in interstate commerce with respect to the goods here in question and therefore there is no issue in this trial concerning the applicability of the statute in this respect.

I come, then, to the specifics of the offenses charged in the indictment. The first count, asserting a violation of Section 1 of the Sherman Act, charges in substance that the three defendants, Bristol, Cyanamid and Pfizer, together with Squibb and Upjohn, which are named as co-conspirators but not as defendants, engaged in an unlawful combination and conspiracy in the unreasonable restraint of interstate trade and commerce in the manufacture, distribution and sales of broad spectrum antibiotics and broad spectrum antibiotic products.

The broad spectrum antibiotic market to which this charge, as well as the other two, relates is alleged to consist of four drugs: Aureomycin, Terramycin, tetracycline and Chloromycetin. All four of these are alleged to be effective against substantially the same range of micro-organisms and are asserted to be substantially interchangeable in medical use. In adddition, it is alleged, Aureomycin, Terramycin, and tetracycline have closely similar molecular structures.

According to the indictment, the conspiracy or unlawful agreement alleged in the first count had four terms or objects or purposes:

(1) that the manufacture of tetracycline would be confined to Pfizer, Cyanamid and Bristol.

(2) that the sale of tetracycline products would be confined to the three defendants, together with Squibb and Upjohn.

(3) that the sale of bulk tetracycline would be confined to Bristol, and bulk tetracycline would be sold by Bristol only to Upjohn and Squibb.

(4) that the sale of broad spectrum antibiotic products by the defendant companies and the two co-conspirator companies would be at substantially identical non-competitive prices.

The indictment goes on to allege various "means and methods" employed to effectuate the conspiracy. I will return to this subject after a while and consider these alleged means and methods at some length.

Turning for a moment to the second count, this rests on Section 2 of the Sherman Act. It charges in substance that the three defendant corporations, again in concert with Squibb and Upjohn, engaged in an unlawful combination and conspiracy to monopolize interstate trade and commerce in the manufacture, distribution and sale of broad spectrum antibiotics and broad spectrum antibiotic products. The terms of the conspiracy alleged under this count are the same as those alleged in Count 1. Similarly, this count charges the same means and methods as those under the first count.

The third count, also claiming a violation of Section 2 of the Sherman Act, charges that, by the same means and methods as those alleged in the two preceding counts, the defendants did monopolize interstate trade and commerce in the manufacture, distribution

and sale of broad spectrum antibiotics and broad spectrum antibiotic products.

You will have noted that the second count charges a conspiracy to monopolize while the third count charges the achievement of the objective to that alleged conspiracy, namely, the actual monopolization, which is a separate offense under the statute.

Now, having sketched the charges in the indictment, I will go back and consider with you in more particular detail the legal significance of these charges, the things which must be proved beyond a reasonable doubt to sustain a conviction on any of them, and the resulting issues presented for your resolution.

A basic and essential element in all three counts is the charge that the defendants, during the indictment period, were joined in an unlawful combination or conspiracy. You will note, by the way, that the two words "combination" and "conspiracy," while they are both used in the statute and in our discussion of the statute, may be considered for our purposes as having but a single meaning, which I will proceed to elaborate in a minute or so.

You will also note that I have referred to this as an essential element in all three counts, although only the first two charge the crime of conspiracy as such. I will expand a bit on this point when I come to talk further about the third count, which charges the substantive offense of monopolizing. Postponing that, I will define for you now the meaning of the word "conspiracy," and charge you that this explanation is what should guide you in determining whether a conspiracy of the kind alleged has been established by the evidence.

The type of relationship condemned by law as a conspiracy is often described in shorthand terms as a "partnership in crime." To create such a relationship, two or more persons must enter into a mutual agree-

ment or understanding that they will act together for an unlawful purpose. In the circumstances of the present case, before you may find any defendant to have conspired, you must find that at least two of the defendants were parties to the conspiracy.

In the absence of an agreement or mutual understanding or meeting of the minds there can be no conspiracy. It is the agreement to act together for an unlawful objective that constitutes the gist of this crime.

This central requirement of an "agreement" does not mean, however, that in order to create an unlawful combination or a conspiracy, the parties must meet together at some time and place or, indeed, that they must meet together at all. Nor does it mean that their undertaking must be embodied in express or formal contractual statements, or express words of any kind. Your experience tells you—and the law recognizes—that this is rarely the way in which criminal conspiracies are formed. It is sufficient, therefore, if some character or manner of communication is had between the defendants which results in a definite, mutual understanding of the common, unlawful objective or purpose to be accomplished, and a definite, mutual understanding that they will combine their efforts to that end.

Because express agreements are neither necessary nor common in establishing unlawful conspiracies, the crime is one which may be shown from circumstantial evidence as to a course of conduct or business dealings. In other words, whether the prosecution has sustained its burden of proving a conspiracy must frequently be judged by what the jury finds the parties actually did rather than from the words they used. The unlawful agreement may be shown if the proof establishes a concert of action, with all the

parties working together understandingly with a single design for the accomplishment of a common purpose. It is not essential to such a showing that all the parties should have acted exactly alike. Nor is it a defense if a party is found to have been forced by economic or other pressure to join in the concert. Acquiescence and participation in the illegal scheme are as much a violation of the Sherman Act as the creation and promotion of one.

On the other hand, it is the government's burden to show such acquiescence and participation as a matter of conscious choice beyond a reasonable doubt. It is not sufficient to show that the parties acted uniformly or similarly or in ways that may seem to have been mutually beneficial. If such actions were taken independently as a matter of individual business judgment, without any agreement or arrangement or understanding among the parties, then there would be no conspiracy, even though the separate actions were substantially concurrent and tended toward the accomplishment of similar objectives separately pursued by the individual companies.

You will note that the basic charge of a combination or a conspiracy running through the three counts alleges a single, overall conspiracy, with the same terms and objects and employing the same means and methods, and this is central and essential throughout the indictment.

You are also aware—and I will be mentioning this again—that the defendants are not all charged with participation in all the acts or practices alleged, and they are not even charged with simultaneous entry into the claimed conspiracy. These aspects of the evidence in this particular case lend to several points which you must have in mind as you go to think about what your verdict should be.

In the first place, if any of these defendants is to be found guilty, this finding can rest only upon proof of the conspiracy charged in the indictment. You could not, for example, convict any of the defendants for engaging in other wrongful conduct or for joining in other or different conspiracies. I hasten to add, this is not to imply that there were, or that anyone suggests, such other or different things, but I merely emphasize here the fundamental principle that unless a defendant is found guilty upon the charge as he met and defended it, he or it cannot be found guilty at all.

Now, this does not mean, however, that each defendant must be found to have participated in or even to have known about each act or aspect of the conspiracy. If you find the conspiracy as charged, a party is held responsible for joining and participating in it even if its role was less major than others and even if such participation existed only for the part of the life of the conspiracy. When a defendant enters into a conspiracy, he becomes responsible in law for each and every act of the other members in furtherance of the conspiracy, including such acts occurring before he joined and without his direct participation or knowledge.

The vital question with respect to each separate defendant and the separate evidence directly relating to each is whether that defendant entered into the alleged conspiracy, if the conspiracy existed. If such entry is shown, then the act of association creates, as I have said, a kind of partnership in crime, and each member of the conspiracy becomes in a relevant sense the agent of all. This means that acts or declarations of one conspirator which occur during the conspiracy and in furtherance of a common object become the acts and declarations of all and may be considered evidence against all. Bear firmly in mind, however,

that you may not convict any of the defendants unless the evidence, considered specifically and individually in relation to that defendant, establishes its membership and participation in a conspiracy charged by the indictment.

Now I must expand a little bit on this last point. You have been given evidence during the course of this trial emanating from one or two of the defendants in the absence of one or both of the others. Ordinarily, as to an absent defendant, such evidence might well be excluded as hearsay. But, on the agency theory I have just mentioned, such declarations or statements are admitted against an absent member when they are made during and for the conspiracy. That omits, however, the foundation and initial question as to who is a member.

The resulting problem is resolved, and you will resolve it, in this way: If, but only if, there is substantial independent evidence to show a party's membership in a conspiracy, declarations of the kind I have just mentioned made by other members may be considered against that party. The independent evidence need not be sufficient in itself to show the absent party's membership in a conspiracy. But it must have a substantial tendency in that direction.

And so, before you may consider the declarations or statements of one defendant against another, you must satisfy yourselves that independent evidence exists to warrant use of such evidence against that other. This point applies equally to declarations or statements of either of the alleged co-conspirators, Squibb and Upjohn.

Now I move from the general principles of conspiracy law to the particular offense charged in the first count of the present indictment, and this quite briefly is that the defendants conspired to achieve

the four ends or objectives I read to you in listing the so-called terms of the alleged conspiracy. In substance, those four may be summarized under two headings: first, as a conspiracy to exclude other companies from the manufacture or sale of tetracycline and, second, as a conspiracy to fix the prices of broad spectrum antibiotic products. While both kinds of objectives are charged, either one would be sufficient to make out the type of violation denounced in the Sherman Act and in Count 1 of this indictment. And while the prosecution contends that the defendants and the alleged co-conspirators attain their objectives, this is not, strictly speaking, an essential element of the case. If the government had sustained its burden of proving a conspiracy for either type of purpose, the offense would be established whether or not its ends were accomplished.

Now, as to the term or objective concerning the exclusion or elimination of competition, I charge you that the Sherman Act outlaws any conspiracy—as I have defined that term for you—which is made with the purpose and intention of unreasonably barring acts or potential competitors from the market or eliminating competition among and between the alleged conspirators. Thus, if it was agreed or understood that the parties were to exclude others from making or selling tetracycline, this goal amounts to a form of unlawful restraint of trade. Similarly, if there was a conspiracy to have bulk sales made exclusively by Bristol, with Cyanamid and Pfizer committed to refraining from competition for bulk customers—or if it was agreed that no companies but Squibb and Upjohn would be permitted to make bulk purchases—such arrangements would constitute the unlawful objective alleged in Count 1.

Now I emphasize here—and I trust you will have sharply in mind throughout—that the gist of the crime is the conspiracy or unlawful agreement. So, for example, you could not convict merely upon a finding that the manufacture and sale of tetracycline were confined in the way the government alleges, that is, on a finding that only the defendants manufactured tetracycline, that only the defendants, plus Squibb and Upjohn, sold tetracycline products, and that only Bristol sold bulk, and only to Squibb and Upjohn. If this situation came about through the independent actions and decisions of the companies involved—with no conspiracy, as I have defined the term—the law was not violated.

Unless you conclude that the defendants were acting understandingly in concert, or conversely, if you find that they were acting independently, prompted by independent judgments and independent company policies, you may not find that there was an unlawful combination. Likewise, if you should conclude that the prosecution has failed to demonstrate that any one of the defendants was not acting entirely on its own, you must find that any such defendant was not a member of the combination or conspiracy, even though you determine that such a combination or a conspiracy did exist with the remaining two defendants as members.

Similar principles apply with respect to the alleged objective of price-fixing. The Sherman Act declares illegal any combination formed for the purpose of raising, lowering, setting, fixing or stabilizing the price of a commodity in interstate or foreign commerce. Even if the members of such a combination are in no position to control the market, their combination to interfere in any such ways with the free play of market forces would be an unlawful activity.

This prohibition is a broad and strict one. If there is a conspiracy to tamper with prices, the law is violated whether or not the conspirators agree to charge identical prices. It is illegal to agree upon a range of prices or to agree upon some maximum or minimum price. The same is true of agreements to set list prices, the amount of cash discounts, or similar factors affecting price terms. A conspiracy to fix list prices is forbidden even if such prices are used only as starting points for the allowance of discounts and are not used in themselves as the amounts to be charged in particular sales or classes of sales. If a price-fixing agreement exists, it is no defense that the prices charged are reasonable, nor is it a defense that the conspirators engage in competition with respect to matters other than price. Furthermore, if such a conspiracy existed with respect to one or more classes of trade or groups of customers, it would be unlawful even though it did not extend to other classes or groups.

Remember, once again, that it is the conspiracy which is the heart of the matter, whether or not the goal of the conspiracy is achieved. If there is a conspiracy to fix prices, the statute is violated. If there is no conspiracy, the fact that prices are uniform in the marketplace is not in itself any violation of the law.

Your experience teaches you—and the governing law takes into account—that uniform prices commonly result from the forces of supply and demand operating upon independent sellers in the market. Where this is so, the Sherman Act is not violated. On the other hand, as I will be mentioning again, uniform prices, maintained at a constant level over long periods of time—if such prices are artificial and unrelated to supply and demand or to other variations or changes in the pertinent economic factors—may be considered by you as some evidence from which an agreement or

understanding or concerted action to restrain trade may be inferred.

Let me summarize up to here the point about price-fixing. If you find that the defendants (or any two of them) agreed upon list prices or publishing prices, or on prices to be charged for sales to any class of customers, you must find them guilty under Count 1 of a conspiracy in restraint of trade, providing, of course, that you also find the other elements of the crime to be covered in these instructions.

Returning now to the second and third counts of the indictment, and repeating their substance very briefly, these charge, respectively, that the defendants, first, engaged in a conspiracy to monopolize, and, second, committed the substantive offense of monopolizing the manufacture, distribution and sale of broad-spectrum antibiotics and broad-spectrum antibiotic products in violation of Section 2 of the Sherman Act.

In considering both of these counts, you must now apply the meaning of the word "monopolize" as it is used in the statute and alleged in the indictment.

That term "monopolize," in the sense pertinent here, means the joint acquisition or maintenance by the members of a conspiracy, formed for that purpose, of the power to control and dominate interstate trade and commerce in a commodity to such an extent that they are able, jointly and as a group, to exclude actual or potential competitors from the field, and to raise or control prices, provided that the group has the intention and purpose to exercise such power.

That's a terribly long sentence. I will re-read it.

Again, the term "monopolize," as we use it here, means the joint acquisition or maintenance by the members of the conspiracy, formed for that purpose, of the power to control and dominate interstate trade and commerce in a commodity to such an extent that

they are able, jointly and as a group, to exclude actual or potential competitors from the field, and to raise or control prices, provided that the group has the intention and purpose to exercise such power.

It is not necessary to make out the offense that the power and intent should extend to the exclusion of all competition or all competitors; it is sufficient if it reaches an appreciable part of the commerce in question and there is power and intent to exclude competition to a substantial extent.

The critical questions here are questions of power and intent. The material consideration in determining whether a monopoly exists is not that prices are actually raised or that competition is actually excluded, but that the power exists to raise prices or exclude competition when a group acting in concert desires to do so.

A conspiracy to monopolize, as charged in Count 2, or the substantive offense of a monopoly actually achieved, as charged in Count 3, must relate to some identified market in a specified commodity or commodities reasonably interchangeable in their uses by purchasers or consumers of such goods. Here, you will recall the market alleged is claimed to be comprised of four broad-spectrum antibiotics: Aureomycin, Terramycin, tetracycline, and Chloromycetin. In appraising both the conspiracy charge in Count 2 and the substantive charge in Count 3, you will deal, among other things, with the evidence as to market shares held by the defendants and others to determine whether the alleged power reached to an appreciable part of the commerce in question. You will consider in this connection the relative positions of the alleged conspirators in relation to the changing position of Parke, Davis, which, as you know, is not alleged to be a conspirator and which controlled

a large and, until 1961, an increasing share of the market in question with its patented product, Chloromycetin.

Now, I emphasize, at the risk of undue repetition, once again the central importance here of the contention that the defendants acted in concert—that they were engaged in a combination or conspiracy as that has been defined for you. It is in no respect a violation of the law that a number of corporations, each acting individually and independently for itself, may hold or control an appreciable part, or all, of the market for a commodity sold in interstate commerce. Furthermore, it is not the law that every "monopoly," in the general sense of that term, is illegal. So it is important to remember in this case that a patent confers a lawful monopoly upon the inventor or assignee of the inventor of a useful product. In the absence of conspiracy with others, the holder of such a patent monopoly may keep and enjoy it for himself, or may license or refuse to license it as he sees fit. Similarly, two owners of patents may cross-license each other and may decide, lawfully and independently, not to issue licenses to others. Where such patent rights are exercised in this way independently, the holder or holders of patents are free under their patents to exclude competition and control prices without violating the Sherman Act or any other law in any way.

What is forbidden, however, and what the government charges was sought and accomplished here is an agreement among competitors to use and restrict patent licenses as a means of excluding other competitors and controlling prices of the patented commodities. And this is the vital sense in which the charge of conspiracy is essential to both the second and third counts as well as to the first. You may not treat

as unlawful the exercise of patent rights, or any licenses of such rights, or any refusals to license, unless you are persuaded beyond a reasonable doubt that such actions were taken pursuant to the unlawful conspiracy charged in the indictment.

With these thoughts in mind, you will determine under Count 2 whether there was a conspiracy to monopolize within the meaning of both those terms, "conspiracy" and "monopolize," as they apply in this case. If you find that the defendants, or any two of them, entered into such a conspiracy, that would warrant a conviction of guilty on the second count whether or not the objective of monopolizing was achieved. If you find that such a conspiracy existed, with two of the defendants participating but not the third, then you should, of course, acquit that remaining defendant. And again, unless you find that at least two so conspired, you must acquit all three.

You should proceed, in the circumstances of this particular case, to a decision on the third count only after you have decided the second. An acquittal on the second count logically and necessarily requires an acquittal on the third. If you convict on Count 2, however, you should then consider whether the defendants achieved the goal of the conspiracy to monopolize—that is, whether they succeeded in monopolizing the trade and commerce in question by actually acquiring the power to control prices and to exclude competition. I remind you that such a finding, if you make it, is sufficient if you determine that the requisite power and intent existed, whether or not you find actual exclusion of competitors or actual raising of prices.

I have spoken several times up to now touching the subject of intent, but it is necessary to mention again and separately that this element of intent is

part of what the government must prove in this criminal case. Before you may convict on any count, you must be persuaded that the defendants, or any two of them, entered knowingly and purposely into the conspiracy charged. Similarly, you must find under the third count that they knowingly and deliberately took the combined steps leading to the creation of a monopoly as a necessary and intended consequence of what they did.

The government is not required to prove, however, that the defendants had a specific intent, as we call it in the law, to violate the law or that they considered their actions to be illegal. It need not be shown, in other words, that they intended to restrain or to monopolize the interstate commerce in question if the evidence establishes that they knowingly and purposely took the actions amounting to the violations I have defined for you. If intentional conduct is shown in this sense, it would not be a defense that the defendants thought they were behaving lawfully or sought to achieve results they deemed beneficial or somehow desirable.

Now, intent is a fact to be determined like other facts. In deciding this question, you may consider all the actions shown by the evidence, the explanations you have heard for such actions, and all the attending circumstances. You may take into account the evidence that defendants had legal advice and the extent to which they may appear to have acted without such advice, although neither this item nor any other is likely to be decisive in itself. Ultimately, as I have said, you must appraise all the evidence and draw your inferences, as reasonable and experienced people, as to the intent with which the defendants proceeded.

Since intent is a quality of the human mind, and since we deal here with defendants which are corporations, this is a suitable point at which to mention the subject of a corporation's responsibility for the actions of its agents. Your problem, of course, is to determine whether these corporations have done the things charged, with the intent charged, by virtue of and through the acts of their officers and employees.

In general, corporations are held responsible for the acts and statements of their agents when such acts and statements are performed or made within the scope of the agents' express or apparent authority. It is not necessary for a finding of such authority that the agent or employee be specifically authorized or instructed to commit the particular act or make the particular statement. There may, of course, be such express authority in a particular instance, but there is also apparent authority, which is the power or competence outsiders would normally assume the agent to possess, judging from his position with the company, the general scope of his known functions, and the circumstances surrounding his past conduct. As I have said, a corporation is liable for the acts of the agent within his apparent authority as well as his express authority, even if such actions may be contrary to instructions and in violation of the law.

The scope of an agent's authority may be inferred from all the circumstances in which he acts. You may find actions authorized where they were long continued, where they were long known, or where they appear from all the facts to have been reasonably expected based upon the status and general functions of the officer or employee in question.

Now, you may recall my mentioning at the outset that you should be alert for matters of time and chronology as the evidence came in in your effort to

build and understand the total picture from that evidence. I want to mention some brief final thoughts under this general heading.

For one thing, matters of time will be of importance to you as you follow the requirement that each individual defendant is to be considered individually and separately. It is charged, as you know, that Pfizer and Cyanamid formed a conspiracy in or about November 1953 and that Bristol entered only some two years later, in December 1955. You will have in mind, as another example on this subject, that Cyanamid is not shown to have participated in any of the negotiations of December 1955 or the settlement agreements of March 1956 among Pfizer, Bristol, Squibb and Upjohn.

You have been instructed that if a party joins a conspiracy, its liability is not lessened because it may have participated in less than all aspects or for less than the entire period. But the timing and order of events must obviously concern you as you proceed to determine whether and when any of the defendants entered into any conspiracy at all.

A further point on the question of time is this: While the prosecution alleges approximate dates for the commencement of the conspiracy, and charges that the conspiracy continued up to the date of the indictment in August 1961, it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges. If you find all the other elements established, it would be sufficient for Counts 1 and 2 if you found that the conspiracy existed and was continued for any substantial portion of the five-year period ending at August 17, 1961. Similarly, on Count 3, the charge of monopolizing, in addition to the other requirements, the government will have satisfied its burden in this

respect if it has proved beyond a reasonable doubt that the defendants monopolized the relevant trade and commerce for some substantial portion of the same period.

Concluding now on this question of time, I want to mention one question with which you need not be concerned as you think about the dates and the period involved in this case. I said on the opening day that you might have to consider the statute of limitations. It turns out, however, that there is no controversy in the case over that. You should deem it undisputed, because it is undisputed, that the indictment was timely filed within the five-year period preceding August 17, 1961, and is valid so far as the statute of limitations is concerned.

I mentioned somewhat earlier, and postponed discussing, the portion of the indictment which alleges some 12 means and methods by which the defendants are claimed to have effectuated the combination and conspiracy. I return to that somewhat extended subject now.

While the indictment asserts 12 of these so-called means and methods, the prosecution is not required to prove that all of them were agreed upon to carry out the alleged conspiracy or that all were actually used or put into operation. But it is necessary, before there may be a conviction, that the evidence establish to your satisfaction that one or more of these means or methods were agreed upon for use to effect some object or purpose of the conspiracy.

To put that same basic thought another way, though you may find that the defendants, or some of them, took most or all of the actions characterized in the indictment as "means or methods," this alone would not justify a conviction unless you also find that one or more of such actions were taken pursuant to, and

for purposes of effecting or effectuating, the conspiracy charged by the prosecution.

You should also have in mind that none of the actions or arrangements considered under this heading is required to be shown to have been unlawful in itself in order to warrant a conviction. Again, as throughout this case, the core of the matter is the alleged conspiracy and the question whether any and all of these actions were taken because of, and for the objectives of, such a conspiracy.

Now, the first two of the alleged "means and methods" relate to the granting and refusal of patent licenses. The first charges, and I quote, "Cyanamid licensed Pfizer and Bristol to use its Aureomycin patent in the manufacture of tetracycline and refuse to license all other applicants."

The second alleges that "Pfizer licensed Cyanamid and Bristol under its tetracycline patent and refused to license all other applicants."

As to the first of these two, there is no evidence that anyone other than Pfizer and Bristol requested from Cyanamid a license under its Aureomycin patent. The evidence in this respect would appear to show no more than the existence in Cyanamid of a general policy against the licensing of its Aureomycin patent.

With respect to both of these first two means and methods, I remind you of my earlier instructions that a patent holder, in the absence of an unlawful agreement or conspiracy, is free to license or refuse to license whomever he wishes. You should also understand that the mere agreement to cross-license between companies which hold blocking or conflicting patents is not a violation of the antitrust laws. Indeed, such interchange of patent rights in settlement

of controversy is often necessary in order to permit technical progress.

In addition, I think it has already been made clear to you that the holder of a patent may license others to make, use or sell the discovery, with such restrictions as may be within the limits of the patent grant. Thus, in the absence of conspiracy, the owner of a patent on a product may license another company to manufacture and use that product solely in the manufacture of some other product. The kind of license you understand that was involved in the Pfizer use of Aureomycin to make tetracycline.

The holder of patent rights has, in other words, a form of lawful monopoly and freedom to exclude others from sharing it. But the patent laws as I have told you, do not authorize him to agree with his licensees that he will exclude or restrict others by refusal or limiting grants under his patent to such other or third parties. Agreements of this kind come within the prohibitions of the antitrust laws rather than the privileges granted by the patent laws.

Now the government does not claim that any of the license agreements involved in this case or indeed any of the written agreements in this case is in itself unlawful or in combination with any of the others, without reference to other facts. Accordingly, you may not infer an antitrust violation merely from the existence of such agreements or from any of the terms contained within them. Your task here is to consider the grants of licenses together with the refusals or absence of such grants to others, in the light of all the testimony and documentary evidence concerning licenses and related problems, in order to determine whether this evidence tends to show the presence of a conspiracy, the absence of a conspiracy, or nothing either way.

In considering the extent to which licenses were granted or refused or not granted, and in appraising the total pattern of licensing arrangements, you should consider what would have occurred in the normal course of lawful business conduct. To what extent would normal and independent business judgments by the companies involved have dictated the arrangements shown by the evidence? To what extent do the arrangements, in light of all the other circumstances, tend to support the government's thesis that patent licenses and refusals to license reflected some agreement or understanding by which the alleged conspirators undertook to restrict entry into the market and to restrict competition, either among themselves or with others?

Questions of this kind are what you should be asking with respect to the matter of licensing and with respect to the entire pattern of conduct upon which the government bases its charges.

As we proceed through the various things alleged as means and methods of the conspiracy, consider whether each one fits within a normal pattern of independent business behavior by each of the companies involved, or whether each or any of these things tends to show action in concert for one of the unlawful objectives charged in the indictment. Then, in your eventual weighing of the case as a whole, ask yourselves the same question about all of these specific factors viewed together and in their total setting.

Another means and method by which the indictment charges that the conspiracy was effectuated is that, and I quote, "Cyanamid assisted and cooperated with Pfizer in obtaining for Pfizer a patent on tetracycline."

This allegation refers, as I am sure you recall, to the settlement between Pfizer and Cyanamid of the first patent interference relating to tetracycline, the actions taken by Cyanamid pursuant to that settlement leading to a concession of priority to Pfizer by Cyanamid, and to the various actions and positions taken by Cyanamid in the second or so-called "salt" interference proceeding.

In connection with both interferences, you will recall, the government's claim is that Cyanamid supported and furthered Pfizer's efforts to obtain a patent, and that this reflects and tends to prove the kind of unlawful agreement between competitors which is the basic element of the government case. Cyanamid argues that it opposed Pfizer more often than it took positions supporting Pfizer, and that the conduct in question was, on its face and as explained by Cyanamid's representatives, nothing more than the self-interested action of an independent company pursuing its own legitimate objectives.

The government says that the number of motions is not a substantial criterion and that actions and statements of Mr. Edelblute for Cyanamid were basically cooperative rather than adversary.

In connection with this subject, I should remind you of things you learned about the patent interferences, and perhaps add one or two other thoughts on this subject that may help you to understand the pertinent Patent Office context.

Under our system of patent law, the patent is granted to the first inventor, not to the applicant who is first to file. So when the Patent Office determines that two or more applications are pending for the same invention, it declares an interference proceeding, preceded by the notice to copy claims with which you have become familiar, so that the question

of which applicant was the first inventor can be resolved.

An interference is declared only when the patent examiner has made an initial decision that the subject matter of the claim in the interference is patentable, and has so advised the applicants. Otherwise, the parties and the Patent Office would be subjected needlessly to useless, and often lengthy and expensive, procedures to determine priority where it is apparent from the outset that none of the parties involved had a right to a patent.

However, this initial or tentative determination that one of the parties will be entitled to a patent remains subject to reconsideration and change, as has been illustrated in this case. Even though an interference has been declared, the end result may be a determination that none of the applicants is entitled to a patent.

Upon the declaration of an interference, separate or ex parte prosecution of each application involved in the interference is suspended. Although normally each patent application is kept secret in the Patent Office and handled ex parte, as we say, during an interference each party has access to the official application file of the others. When the interference proceeding ends and the parties resume their separate prosecutions, the rule of secrecy is once more enforced.

After an interference is declared, each party files a preliminary statement giving the facts and dates which he hopes to prove. Before actual trial in the interference begins, there is a motion period during which a party can try to win on procedural grounds or seek to narrow or broaden the scope of the interference. If the proceeding is not resolved in the motion period, it goes on to an actual trial during which testimony is taken, documentary evidence is introduced, briefs are submitted, and hearings are held.

If the Patent Examiner during the pendency of the interference finds a reference of other reason which in his opinion renders the subject matter unpatentable, he may change his prior ruling on patentability and dissolve the interference, as I have mentioned already. Any of the parties is entitled during the interference proceeding to seek such a result, that is, to claim that patentability is not shown and that no patent should issue to any of the applicants concerned.

As is true with respect to other types of litigation, it is entirely lawful for the parties to an interference, in order to avoid the substantial delay and expense often involved in such proceedings, to seek amicable settlement of their dispute by agreeing to an informal exchange of evidence on priority and to a good-faith attempt to determine from that evidence who was the first inventor.

They can also agree in that connection that the loser will file a concession of priority in the Patent Office and that the one in whose favor the determination of priority is made will license the other. Similarly, cross-licensing of patent rights made in connection with such an agreement, unless made pursuant to a conspiracy to fix prices or exclude competition, is a lawful arrangement.

Now, in connection with the charge that Cyanamid assisted Pfizer to obtain a patent in order to seek unlawful conspiratorial objectives, you will, of course, want to review the evidence you have heard concerning the extent to which the positions of Pfizer and Cynanmid may have indicated cooperation and mutual support, and the extent to which such actions displayed the individual pursuit of their individual interests by these separate companies.

To what extent, if at all, did Cyanamid actually appear to be helping Pfizer to obtain a patent under

which Cyanamid would thereafter be required to pay royalties and non-licensed producers of tetracycline might be excluded? To what extent did Cyanamid, pursuing its own goals, oppose and resist Pfizer's application on legitimate and available grounds?

Considering both the evidence of what Cyanamid did and the explanations of its officials for these actions, was this the normal and self-regarding conduct of a competitive company? Or did it reflect the existence of an understanding and joint purpose by Cynanmid and Pfizer to pursue the objective of excluding competition or fixing antibiotic prices?

You should carefully consider all of the testimony and documentary evidence concerning the first and second patent interferences, the Pfizer-Cyanamid settlement of the first interference, and the circumstances surrounding these proceedings, to determine whether this evidence tends to show the presence of a conspiracy, the absence of a conspiracy, or nothing either way.

Another claim concerning alleged means and methods made by the government is that each of the defendants withheld pertinent and material information from, and otherwise misled, the Patent Office prior to issuance of Pfizer's tetracycline patent. All of the evidence on this subject relates to the period before January 11, 1955.

Somebody who is aware that this may take a number of minutes has suggested that this would be a good point for a recess and I concur in that opinion. Let us take ten minutes and I will resume.

(Recess.)

The COURT: I had just started on the alleged "means and method" which consists of the charge that the defendants withheld material information from and otherwise misled the Patent Office prior to issuance

of the Conover, Pfizer's tetracycline patent, and I had said, reminding you of another point in which time is important, that all of this evidence and this subject relate to the period before January 11, 1955, and that is significant here because although the indictment includes Bristol in this charge, you will recall it is not actually claimed that Bristol was a member of the conspiracy if one did exist prior to December 14, 1955. In view of this, and in view of the testimony of Dr. Taylor with respect to Bristol's activities in the Patent Office, you are to consider that the allegations of the indictment dealing with Bristol's conduct in the Patent Office have been withdrawn from the case.

However, Dr. Taylor's testimony remains in the case with respect to any other issue it may affect, and you may consider Bristol's knowledge and state of mind during the Patent Office proceedings to the extent, if any, that this appears to you to have any bearing on the events surrounding Bristol's alleged entrance into the conspiracy in December of 1955.

Now, as to this charge of withholding information during the Patent Office proceedings, I instruct you that those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have a duty to report to that office all material facts which are known to them and believed by them to be germane to their applications. They are required to disclose any prior art coming to their attention which might preclude the issuance of a patent. Note here that I have referred to material facts and that I will be adding some thoughts in a minute concerning this element of materiality.

As to alleged misrepresentations, I charge you that when an applicant, in response to an Examiner's question or request, or otherwise, *does* present *facts* to the

Patent Office, he should present those facts truthfully to the best of his belief and should not misrepresent them. That duty is breached when the applicant, or his representative, reports as material facts things he knows to be false. It is also breached when he reports as such facts things about which he has not made sufficient investigation to know whether they are true or false, particularly if it later turns out that information which should have come to his attention shows that the things he reported were not accurate.

However, the mere fact that statements made to the Patent Office were erroneous, or were not what the Patent Examiner asked for, does not make them intentional misrepresentations, unless the person making the statements did not have a bona fide belief in their truthfulness and their responsiveness.

Thus, an essential element of any charge that Pfizer or Cyanamid, or both, improperly withheld information from or otherwise misled the Patent Office is the establishment of an intent to deceive on the part of their representatives. The deception, if you find any existed, could not matter if it was merely accidental or negligent. It must have been the product of a conscious and deliberate intent to misrepresent by those prosecuting the tetracycline applications before Examiner Lidoff.

In addition, in order to constitute the kind of withholding or deception charged by the government in this case, the conduct must be such as intentionally to deceive the Examiner with respect to facts which, as I have said, are material. There must be, in other words, an intent to deceive the Examiner into granting a patent the issuance of which would otherwise have been refused or delayed for some substantial and uncertain period of time.

The charges of withholding and misrepresentation against Cyanamid and Pfizer all relate, as you know, to the information given by their representatives relating to the question of possible co-production or inherent production of tetracycline during the production of Aureomycin. The dispute between the government and these defendants centers upon what information was, in fact, of interest to the Examiner and whether the answers to his questions were deliberately unresponsive and misleading. You should be concerned then with what Examiner Lidoff wanted to know, only so far as he expressed what he wanted to know to the representatives of Pfizer and Cyanamid. The thoughts in Mr. Lidoff's mind are relevant only to the extent that they were communicated to these individuals. After determining what it was Lidoff wanted to know—as he expressed it—you must consider what the individuals with whom he spoke, in view of all the surrounding facts and circumstances, should reasonably have understood Lidoff to mean. Then, in the light of this understanding, you must determine whether the alleged withholding or deception, did, as a matter of fact, occur.

At this point it is pertinent to provide you with some additional information about Patent Office proceedings. Applications for a patent are filed in the Patent Office, which then examines each application and withholds issuance of a patent unless it appears that the applicant is entitled to one. When an application is filed it is assigned to an Examiner who specializes in the subject matter with which that application is concerned.

The scope of any patent is determined by its claims, the breadth of which depends on the inventor's contribution to a particular art. If the invention is a substantial advance, he may receive broad claims, if the

contribution is relatively narrow, there is a correspondingly smaller scope of patent protection. Patents usually have a number of claims which define the invention or parts of it in different ways, and which may vary in their scope.

The Patent Examiner's job is to try to determine the breadth of the claims to which an applicant may be entitled. He does this by studying the application and its claims in the light of prior art patents and literature which he has searched in an attempt to locate earlier disclosures of identical or similar subject matter.

If the Examiner believes that one or more claims should be rejected, he hands down a so-called preliminary rejection. The applicant then has the opportunity of seeking to persuade the Examiner that his rejection was in error as a matter of law or on the facts. The applicant may also, if possible, or desired, amend his claims in an effort to avoid the rejection. Thus, a preliminary rejection gives the applicant a chance to change his claims. It may also help to avoid appeals from erroneous rulings by the Examiner which he himself could rectify if they were pointed out to him. An Examiner cannot, under Patent Office practice, make a final rejection of claims until after he has examined or considered them at least twice.

Now, Patent Examiners differ in experience, ability and knowledge of the law. Like other people who must decide things, they are not infallible in their rulings. Some, including Mr. Lidoff, who had many years of experience and appears to have been regarded as an able examiner, occasionally base rejection on grounds which they recognize as questionable or unprecedented. Applicants have every right to argue, as I have said, the legal, or evidentiary, insufficiency of an Examiner's rejection. They may also appeal from an

Examiner's final rejection to the Board of Appeals in the Patent Office, and, if necessary, to higher courts outside the Patent Office. Of course, such appeals may involve considerable expense and require a good deal of time, so there is an obvious interest in obtaining a favorable ruling at the first level from the Examiner himself. Nevertheless, such appeals are frequently taken and they often result in reversal of the Patent Examiner's decision.

The Patent Office proceedings that concern us in this case involved several questions of law relating to the patentability of tetracycline and tetracycline hydrochloride. Since the government does not contend that the Pfizer tetracycline patent or any claim thereof is invalid, there is no issue in this case as to whether tetracycline was in fact patentable as a matter of patent law.

There were, however, some rather abstruse questions of patent law that played an important part in the relevant Patent Office proceedings. It seems fair to tell you that there were no mathematically certain answers to those questions, but it is also fair—and perhaps consoling—to tell you that it is neither your job nor mine to reach any definitive conclusions on these legal questions in this case. The legal problems are pertinent only insofar as they may affect your finding of the *facts* on this issue of alleged withholding and deception in the Patent Office.

Now, during the times in question, there was substantial basis for the view that under the pertinent patent law the prior unrecognized and undisclosed existence of a substance would not bar the issuance of a patent on that substance to an individual who first made it available to the public in useful form, or whose invention gave to it a new and different utility. It is also undisputed that the existence of another

antibiotic in commercial Aureomycin, or in commercial Aureomycin fermentation broths, was not recognized in the pharmaceutical art until after the filing of the original Conover or Pfizer application on tetracycline in October of 1952.

Another point which is not in dispute is that certain of the claims of the Pfizer tetracycline patent are narrowly directed to relatively pure product forms of tetracycline. As claimed by the inventor, Conover, these forms of tetracycline had a new and different utility from the old commercial Aureomycin containing small and unrecognized amounts of tetracycline.

Thus, according to the patent law at the time of the proceedings with which we are concerned, a showing that slight, unidentified, useless traces of tetracycline were formed during the earlier production of Aureomycin would probably not have made tetracycline unpatentable.

There is evidence, however, from which you may infer that Examiner Lidoff took the position, as a matter of law, that co-production of any identifiable amount of tetracycline with Aureomycin in the prior art processes of the Duggar and Niedercorn patents would preclude the granting of tetracycline product claims in the Pfizer and other pending patent applications. It also appears that the patent lawyers knew this was Lidoff's position, and that counsel for Pfizer disagreed with it, and urged him to change it.

Lidoff appears to have known that the Minieri application which was pending before him showed co-production of substantial amounts of tetracycline with Aureomycin. He also knew that Duggar and Niedercorn did not on their face disclose any such co-production. But he "speculated," in a word that's been used in this case, that Duggar and Niedercorn might have had co-production without recognizing it, and he

indicated that this might require a rejection of the tetracycline product claims.

At this point, the parties have one of their many sharp disagreements. Defendant Pfizer urges that when he spoke of co-production or inherent production, Lidoff was interested—and, under the law, could only have been interested—in the presence of recoverable, or appreciable, amounts of tetracycline. Defendant Cyanamid claims that Lidoff was interested only in whether tetracycline was present in commercial Aureomycin.

The government contends that under Lidoff's view of the law, the patentability of tetracycline might be barred even by a "wholly unrecognized occurrence of some ineffective amount of tetracycline" in the Aureomycin made in accordance with the processes of Duggar and Niedercorn. Lidoff's interest, claims the government, was not directed solely to the presence of tetracycline in commercial Aureomycin, but extended to whether tetracycline was present either in the Aureomycin fermentation broths or Aureomycin laboratory samples. And, it is urged, Pfizer and Cyanamid were aware that Lidoff was proceeding on this legal premise.

Now, your task, as I have said, is not to decide whether Lidoff was right or wrong on the law. Your problem is to determine, if you can, the position he adopted and communicated to the representatives of Cyanamid and Pfizer. Those representatives were required to take into account the view Lidoff communicated to them in determining what he meant and what facts they should deem material in their presentations to him, since he had the power to deny or at least postpone for some substantial period the issuance of a patent.

In light of what you determine on this subject, and based upon the other things I have mentioned concerning the Patent Office proceedings, it is for you to judge whether the evidence and arguments you have heard about the laboratory tests conducted by Pfizer, in connection with the fermentation broths and microorganism used, and the recovery procedures employed, persuade you that the representatives of Pfizer deliberately withheld or concealed material information from Examiner Lidoff.

You must determine whether the tests Pfizer's people made and reported were good faith efforts to give him the material information appropriate to surmount his rejection of the Pfizer application or whether, on the other hand, they deliberately used tests that were bound to give negative results and were calculated to distort or conceal material facts within their knowlege.

As to Cyanamid, you must determine whether Mr. Edelblute deliberately misled Lidoff with respect to the question of co-production, or whether he deliberately made representations to Lidoff without making sufficient investigation of scientific knowledge within Cyanamid to know whether his representations were true or false. In studying this subject, you should consider that after October 14, 1954, when the second interference was dissolved, the Pfizer application returned to ex parte and secret prosecution.

There is no evidence that Cyanamid had anything to do with the tests conducted by Pfizer during this period after October 14, 1954. However, you may also consider that Pfizer's representatives, in continuing this ex parte prosecution, relied, in part, upon statements submitted earlier—that is, before October 14, 1954—by Mr. Edelblute. In these earlier submissions, you will recall, Mr. Edelblute had stated that there was no evidence of inherent production

in the prior art processes and that in the laboratory of Cyanamid, the presence of tetracycline in the fermentation liquor or in the Aureomycin products made and sold had not been demonstrated.

But even if you find deception as claimed by the government, this alleged "means and method" can lend support to the government's case only if you also find that the deception was carried out pursuant to or in furtherance of the alleged conspiracy between Pfizer and Cyanamid. Fraud on the Patent Office is a very serious matter, with a variety of possible consequences that are not significant in this case, but such fraud is not in itself a Sherman Act violation of the kind that does concern us here. If you find such fraud, either by Pfizer or Cyanamid, or both—but if you find that it was accomplished for the separate and independent interests of either individual company in obtaining a patent—this becomes a matter of no weight whatsoever for the proof of any offense in this case. Only if you are persuaded on all the relevant evidence that the deception was carried out to effectuate the conspiracy (as the indictment charges)—only then may you treat this alleged "means and method" as a factor tending toward conviction.

Let me summarize this subject by saying that before you may treat the evidence under this heading as proof of guilt, you must find beyond a reasonable doubt three things:

First, that the representatives of either Pfizer or Cyanamid, or both, knowingly misrepresented or withheld material information from the Examiner.

Second, that but for such deception, the Examiner would not have allowed the Pfizer application on January 11, 1955, or for at least some substantial period thereafter.

Third, that such deception was practiced by either Pfizer or Cyanamid, or both, pursuant to or in furtherance of the alleged conspiracy.

I turn to another of the alleged means and method set out in the indictment. This charges and I quote, "Cyanamid acquired the competing Heyden patent application on tetracycline and abandoned the product claims therein." As you know, this allegation relates to the Minieri application, and you have heard evidence concerning the prosecution of that application and its inclusion in the second interference on tetracycline hydrochloride.

As to the acquisition of this application, you will recall that it was part of Cyanamid's purchase from Heyden of all of the latter company's antibiotic facilities for a purchase price somewhat in excess of $12,000,000, exclusive of inventories. You will recall that the contract for that purchase was made on approximately November 4, 1954; that the value assigned by the parties to Heyden's various patent rights, processes, and other intangibles (among which were included the Minieri application) was approximately $2,000,000; and that the testimony indicates that the application was not seen by Cyanamid's representatives until the closing of the sale on December 1, 1953.

As to the pertinent law, I don't believe there is a great deal that needs to be said on this particular subject. You will understand that there is no claim that there is anything unlawful in this particular acquisition standing by itself. You have been made aware of the Government's contention that Cyanamid acquired the Minieri application as part of the overall plan and agreement with Pfizer to obtain exclusive power over the manufacture, sale and distribution of tetracycline, with the purpose of using this power to bar competitors or fix the prices on antibiotics and antibiotic

products. You will recall that part of this charge is that it is as part of that effort the Minieri product claims were abandoned in the patent office. It seems sufficient to say on this item that you may consider it together with all the other circumstances in the case, and determine in your judgment whether it has any tendency to establish the ultimate and critical element of conspiracy.

Another means and method alleged in the indictment is that, in effectuating the conspiracy, and I quote again, "Pfizer, Cyanamid and Bristol suppressed litigation involving the validity of Pfizer's tetracycline patent."

Now, the word "suppressed" in this sentence of the indictment is a word that carries connotations of impropriety and wrongdoing. But all of us, and you, the jury, understand that certainly by this time that the purpose of an indictment as a whole is to make allegations of wrongful or unlawful conduct. And so you will understand equally that the particular words of an indictment, like the substance of the accusations, are in themselves no evidence that the defendants on trial did anything unlawful.

The question under this particular heading is whether the settlement of the lawsuits to which this allegation relates—viewing these settlements in light of all the preceding events, the negotiations leading to them, and all the surrounding and later circumstances—were designed and intended to build or further the conspiracy charged in the indictment.

You will recall that the lawsuits in question were the several patent suits begun on and after January 11, 1955, between Pfizer on the one hand and Bristol, Squibb and Upjohn on the other. You will have noted, and you will bear in mind, that the de-

fendant Cyanamid was not a party to any of these litigations.

You will also recall in this connection my earlier instructions about licensing agreements and about the patent laws generally. The written agreements entered into between Pfizer and Bristol, Squibb and Upjohn and the terms of the settlements—settlement—I guess "settlements" is correct—were by themselves completely lawful. They would only be unlawful if entered into pursuant to, or as part of, a conspiracy to exclude other companies or to fix prices.

Appraising these settlements, you will have in mind that the litigation is expensive, time-consuming, and disruptive of the conduct of business. Although it is sometimes necessary, it is a burden to be avoided where possible. Good faith settlement of litigation is perfectly legal, beneficial to the economy, and in the public interest. It is not extraordinary to have patent lawsuits settled with the alleged infringer taking a license and agreeing to pay a royalty, and such settlements are consistent with the public interest unless they are used to conceal some fraud on the patent office or as means to some other illegal end.

You will recall and consider the Government's contention that it was the settlements of December 1955 formalized in March 1956 which brought Bristol, Squibb and Upjohn into the alleged conspiracy. However, whether or not you find that there was such a pre-existing conspiracy to join, the settlements in themselves are not a basis upon which you can find the entry of Bristol, Squibb and Upjohn into a conspiracy. On the other hand, as I have mentioned to you before, actions taken to further or effectuate a conspiracy may be actions which are, standing alone, perfectly consistent with the law. And so the particular problem at this point is the pervasive question

throughout, whether these particular actions—the settlements and settlement agreements—were actions of the kind to further or effectuate a conspiracy.

So here, once again, you must put the problem to yourselves in the context of all its details and circumstances. You may consider in this connection that the outcome of litigation is commonly unpredictable; that on the record as we have it, it was at least a debatable question whether Bristol or Squibb or Upjohn could obtain a declaration that the Pfizer patent was invalid or could succeed in having the patent held unenforceable against them on any ground. You may consider that the issues were complex, lengthy, and difficult both factually and legally.

You may consider that Bristol, Squibb and Upjohn raised a number of contentions to resist enforcement of the patent; that they charged it had been obtained by fraud; that they had hopes of obtaining a declaration that it could not be enforced because it was involved in antitrust violations; and that they may have had other grounds of law or fact upon which they might have hoped to succeed. While you may consider these various theories and the contentions and the pleadings that are in evidence before you, such allegations by these companies against Pfizer are not binding on them by estoppel, as lawyers say, or in any other way.

In considering the settlements and the negotiations that preceded them, the government has placed before you as part of its case, and you may take into account, that lawyers participated in these negotiations, and you may consider the extent, if any, to which the negotiations were conducted without the participation of lawyers. You may consider, as I have said, the events before the negotiations—the extent to which the parties fought each other, the vigor and intensity

of these struggles, and the extent to which, and the circumstances in which, their attitudes of hostility and intransigence may have changed prior to December of 1955.

In connection with the facts surrounding these events, including the wiretapping episode about which you have heard, I charge you that under the law if a court in an infringement litigation is persuaded that the holder of the patent has been guilty of unconscionable conduct relating to his attempts to enforce his patent rights, the court may invoke a doctrine known as "unclean hands" and on that ground refuse to enforce the patent.

It is also the law that use of improper means to obtain confidential business information of a competitor may provide the basis for a claim for substantial damages. You will understand that this proposition has a possible bearing on the subject of the Broady wiretapping episode. But I also instruct you at this point that while this wiretapping evidence was received, it was strictly received as one of the circumstances bearing upon the settlement entered into between Pfizer and Bristol. You should have in mind that neither Pfizer nor any officer or employee of Pfizer was ever charged with this wiretapping, and that no one is on trial in this case for wiretapping. The question of what Broady actually did and at whose instance is not before you as such, and is not to be considered by you in weighing the evidence as to whether or not the conspiracy alleged in this case has been proved except as it bears on the settlement and the settlement agreements of December 1955 and March 1956.

In this same connection, you have heard evidence and argument concerning the filing of the depositions in this courthouse by Bristol, on instructions of Mr.

Schwartz, following the settlement. You may consider this as one among the several pertinent circumstances.

I inform you on this subject that the Federal Rules of Civil Procedure require such filings of depositions in court, but that this requirement may be and frequently is waived by agreement between the parties in civil litigation.

In weighing the Government's charges with respect to the litigation settlements, you should consider not only the terms of those settlements but how the settlements later operated and how they may have related to all the other facts of the parties' relationships to each other and their relationships to the market with which this case is concerned. You should, for example, take into account how the terms of the settlements bore upon the sales of bulk tetracycline and tetracycline products. You should consider how the parties after the settlements conducted their business in bulk and product sales. You should appraise the significance in this context of the fact that Bristol was the only seller of bulk, and that neither Cyanamid nor Pfizer had any of this business during the period covered by the indictment. You may consider the evidence that shortly before December 1955 Upjohn sought from Pfizer a license to manufacture tetracycline, but that Upjohn and Squibb received in the settlement only licenses to compound, use and sell products, so that they had to have some manufacturer as a source of the bulk material. You may consider the prices of the bulk and the evidence as to profitability of Bristol's bulk sales.

You will want to make a judgment, in short, as to what light, if any, is cast upon these settlements by the facts surrounding them, and, conversely, judge whether the settlements themselves tend in any way to

give particular meaning or color or significance to other facts in the case.

Moving to a further item in the indictment, another alleged means and method of effectuating the conspiracy is charged in the following language, and again I quote: "Bristol sold bulk tetracycline only to Upjohn and Squibb. Each of the defendant companies refused to sell bulk tetracycline to all others except that Cyanamid sold a large amount of bulk tetracycline to Pfizer in early 1954 in assisting Pfizer to make a prompt entry into the tetracycline product market."

Now, it appears to be undisputed that except for the single bulk sale by Cyanamid to Pfizer in early 1954, Bristol was the only seller of bulk tetracycline and that the only customers to whom such bulk was sold were Upjohn and Squibb. So far as the law is concerned, it is also undisputed that a seller, in the absence of an unlawful conspiracy, has a perfect right to choose his customer as he will, to sell to nobody or to sell to one or more customers and refuse to sell to others. It follows, as with so many other aspects of the case, that the significance of this particular item, if any, is to be found in its setting, in its context, in its interrelationship with other facts that have been received in evidence.

The documents show that as part of the agreements leading to the settlement with Pfizer, Squibb and Upjohn agreed to purchase their bulk requirements from Bristol for a period of three years following the settlement agreements which were finally concluded in March of 1956. You have learned that these all-requirements contracts were each extended for a year at a time into 1960 and 1961. You have heard about the degree of profitability of the bulk sales to Bristol, and you have heard the explanations by

Bristol's officials of why that company chose to seek two bulk customers and no more.

The Government also relies in this connection upon the agreement between Pfizer and Cyanamid embodied in the written contract of January 11, 1954, providing for arrangements, you will recall, on the settlement of priority on the tetracycline patent claims and including a granting of licenses under the existing aureomycin patents of Cyanamid and including a further agreement that whichever company obtained the tetracycline patent would license the other on stated terms. As part of these arrangements, there was an arrangement, you will recall, for the sale of bulk for some $3,800,000 by Cyanamid to Pfizer, enabling Pfizer to be on the tetracycline market sooner than it might otherwise have been. And you have been told of the pre-existing policies of Cyanamid and Pfizer against bulk sales of their antibiotic products.

There has been testimony that Pfizer, prior to the settlement with Bristol, Squibb and Upjohn had expressed some interest in obtaining bulk orders from Upjohn. But the evidence does not reveal that either Cyanamid or Pfizer, during the period covered by the indictment, sold any part of the bulk tetracycline bought by Squibb and Upjohn, and neither of these defendants, Pfizer and Cyanamid, appear to have sold bulk tetracycline to any other company.

I have mentioned only an outline of the facts relating to this particular subject. You have heard about it more extensively in arguments about the evidence and about the conclusions to which the evidence should lead you. All relevant evidence and your recollection of it will be part of your consideration as you undertake to consider whether this situation concerning bulk tetracycline reflected only normal and lawful business conduct by the several companies involved, or

whether it tends to show the presence of the conspiracy the government alleges or whether it shows nothing either way.

Closely related, and essentially part of the same subject, is the government's charge of another means and method by which it says this conspiracy was effectuated—namely, the agreements between Bristol on the one hand and Squibb and Upjohn on the other whereby the latter two companies were required to purchase their requirements of bulk from Bristol. I have mentioned these. They are set out as the separate alleged means and method.

Now, while the original three-year contract remained in effect, and during the annual extensions in 1959 and 1960, Squibb and Upjohn were precluded by the contracts from purchasing bulk tetracycline from any company other than Bristol. I charge you, however, that in the circumstances of this case, these particular all-requirements contracts were not unlawful when viewed by themselves. They could become unlawful only if they reflected, or tended to effectuate, some agreement or understanding among the companies involved by which they undertook to confine the bulk sales business to Bristol or to exclude other potential competitors and purchasers of bulk from the tetracycline market.

Now, similar considerations to those I have been stating and repeating apply to the next of the means and methods alleged in the indictment. This charge is as follows:

> Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of tetracycline products.

I have mentioned many times that Pfizer, as part of its rights under its tetracycline patent, could lawfully issue licenses as it saw fit so long as these li-

censes and their limitations were given in the exercise of independent business judgment. It was not privileged, however, to agree with a licensee such as Bristol that it would deny or restrict licenses to other competitors such as Squibb and Upjohn.

Accordingly, the vital part of this allegation on the government's theory of the case is the contention that this restriction forbidding manufacture by Squibb and Upjohn was imposed at Bristol's request and as part of an understanding among the parties that Squibb, Upjohn and other potential competitors would be excluded from the grant of tetracycline manufacturing rights.

There is nothing wrongful in itself in the fact that the licenses issued to Squibb and Upjohn were requested by Bristol as part of Bristol's privileges and obligations under its arrangements with Squibb and Upjohn for the settlement of the litigation. The critical inquiry on this score is whether the limitation on Squibb and Upjohn, which barred them from manufacturing, was the particular objective of Bristol and was an agreed objective between Bristol and Pfizer in the issuance of that license.

I come finally to the last three of the means and methods charged in the indictment. These relate generally to the prices and merchandising practices of the defendants and the alleged co-conspirators, and I will read all three before proceeding to give you some additional instructions on them.

The first of these is that:

> Pfizer and Cyanamid maintained substantially identical and unreasonably high prices on Terramycin products and Aureomycin products, respectively.

The second says this:

> Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its tetracycline products on the market at prices which were substantially identical with each other and which conformed to the prices of Terramycin products and Aureomycin products in effect as of November 1953, and all these companies maintained such substantially identical and unreasonably high prices until at least July 1960.

The third says this:

> Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its tetracycline products on the market in dosage forms and customer classifications substantially identical with the Terramycin product and Aureomycin product dosage forms and customer classifications in effect as of November 1953, and have continued to use such substantially identical dosage forms and classifications to date—

meaning, of course, to the date of the indictment in August 1961.

Now, the third of these allegations—as to dosage forms and customer classifications—seems to require relatively little comment in itself.

It was obviously lawful, as a fact standing alone, for each defendant to copy dosage forms, package sizes, customer classifications, or all three, as they were used by its competitors, so long as this was not done to implement an agreement fixing prices or excluding competition among the alleged conspirators or with other possible competitors.

The question is whether these uniform practices and merchandising techniques were adopted in order to effectuate a conspiracy among the defendants and the alleged co-conspirators. Uniformities of this kind, in themselves, may point either way. By making com-

parisons easy, and thus making clear to everyone what others are doing, they may serve actually to facilitate competition. Or, viewed in their setting, they may serve to supply mutual assurance that uniformity is being maintained and that competition is being avoided. The question is put to you once more whether this specific detail and the others reflect the kind of mutual understanding and action in concert charged by the government as the fundamental proposition in its case.

Is this the time we ought to break again? How many think yes in the jury box?

(No response.)

The COURT: I will go on.

Now, as to the allegations concerning prices, these require somewhat more extended comments which is what led me to think that we might be at a point for a break. But before proceeding to the specific subject of prices, let me touch briefly on the government's related contention that broad spectrum antibiotic sales comprised a major portion of the business, and a major source of the profits, of the defendant companies in varying proportions with respect to each about which you have heard.

These assertions, to the extent they are borne out by the evidence, may be considered as part of the general background and setting in which the events of the case transpired. Such evidence may also serve as some evidence of motive, which is always a relevant concern and which has been argued at some length by government counsel. But you will also understand, of course, that the existence of a motive does not serve in itself to establish the commission of any offense charged, or any element of any such offense.

So I turn to the charges concerning prices as such, including the assertion that the prices here in ques-

tion were substantially identical and "unreasonably high." I have touched on this subject already, but it is necessary to expand at this point on the earlier thoughts I have given you.

On the question of uniform or substantially uniform prices you must, of course, make a determination as to the extent to which such uniformity has actually been shown by the evidence. You will want to consider each of the several customer classifications and consider in each instance how far the prices charged were shown to have been identical. You will take into account evidence of variations and divergences in the prices to any of the several classes of trade.

You will recall on this subject that agreement among competitors on prices is forbidden by the Sherman Act even if such agreement does not extend to all classes of trade or all groups of customers. You will also recall that identical prices among competitors are not in themselves proof of conspiracy. Such prices, as I have said already, may result from competition or from agreement, and the question to ponder is which explanation accounts for such uniformity as you may find in this case.

In studying this subject, you will want to take into account, in addition to the question of uniformity, what the evidence shows as to the stability of the prices in question over substantial periods of time. You will want to reflect on the question as to how such stability in price fits with such evidence as you have been shown concerning changes in market conditions that might have had some effect on price, such conditions as total demand for the commodity, the relative and changing shares of the companies involved, changes in production or other costs, and any other

factors which might have had a tendency during the period to cause price changes.

You may consider that the prices, insofar as they were stable, were not raised as well as not being lowered, and consider whether a conspiracy, in the context of this case, might have been expected to result in general price increases. You may ask yourselves, viewing the evidence on this subject, whether price cuts or price changes of any kind would seem to have been indicated or desirable for any of the companies involved from the viewpoint of their individual self-interest. What advantage or disadvantage, if any, would have accrued from such changes by any or all of the companies?

There has been some evidence of specific price changes, and some evidence that changes were effected by several companies at or about the same time, during the period which concerns us. You will take this into account along with everything else. You may consider in this connection any actual experience of these companies with price increases or decreases, the extent to which such price changes were followed or not followed, and any impact of such changes upon the relative positions of the companies in the relevant market.

You have heard evidence and argument concerning competition among the defendants in various respects, including matters affecting price. For example, the giving of free goods obviously has its impact upon price. If you buy a bottle for $1.00 and get one free with it, the net cost of each, as I think we can agree, is 50 cents. So you will want to consider the evidence you have heard concerning free goods, the extent to which such goods were given, and the extent to which they were not.

We have learned that the companies competed through the activities, among others, of their forces of

detail men. There is evidence that each company sought to capture business from the others by promoting its product with doctors and others who affected consumption of antibiotics.

I have mentioned earlier that the Sherman Act makes agreements on price unlawful whether or not competition is maintained with respect to matters other than price. But you will want to judge in this case whether the specific evidence you have heard concerning competition of any kind was consistent or inconsistent with an agreement on prices.

You will recall from the figures which seems largely undisputed that the relative market shares of the several defendants changed over the period involved in the indictment. You may take this in account, view it in relation to the price history and all the other facts you have heard, and determine whether this is consistent or inconsistent with the conspiracy alleged by the government.

I come now to the allegation among the asserted "means and methods" that defendants maintained prices which were "unreasonably high." It is necessary to leave you with several thoughts concerning this specific topic.

To begin with, I must emphasize and be sure you understand with perfect clarity, that neither the Sherman Act nor any other law that concerns us in this case imposes any limit on the price a company may charge for its commodity. So far as the law is concerned, so far as we have it for this case, a manufacturer is perfectly free to produce a commodity that costs him a dollar and sell it for $100 if he can find customers willing to pay that amount.

The Sherman Act does not entitle any court or any jury to impose personal or private or any other kinds of restrictions upon the setting of prices by business-

men exercising their independent and competitive and self-interested judgment. It would be utterly wrong in short for any of us to be influenced even in the slightest degree in this case by any notion that drug prices were too high or too low or even just right, and I add those words "just right" to be sure that we return to and stay centered upon the true problem in this case, and that is the subject as I have repeated it over and over again, of alleged price fixing by agreement.

I have told you before, and stress it again, that this is the kind of conduct against which the Sherman Act is directed in the aspect of present relevance. If prices are fixed in the way forbidden by that Act, it makes no difference that they are fixed at a happy or low or suitable or high and unpleasant level. Price fixing at any level is what is outlawed.

I am trusting that you have these repeated thoughts firmly in mind. I return then to the question of what significance, if any, there may be in this case in the charge that the defendants' prices were "unreasonably high."

In the light of what I have just said, I think you will find it helpful to translate the word "unreasonable" to mean "unusual" or "artificial" or "extraordinary." By these suggested definitions I am trying to convey the thought that the idea of unreasonableness in the present context is meaningful only if it is understood to refer to kinds of price behavior or price levels which appear to be divorced from variations and differences in available supply or demand or cost or other economic factors that may normally be expected to cause variations or changes in the prices charged in a competitive market.

To put the thought in another and slightly shorter way, the charge of unreasonableness in this case is

material only insofar as it poses the issue whether the prices involved exhibited qualities or peculiarities of a type that could be deemed evidence that such prices resulted from agreement rather than from competition.

This is the basis, apart from the subject of motive, upon which I have allowed evidence to be placed before you concerning the various cost and profit data of the several companies.

Through such evidence the government has attempted to establish that the prices of broad spectrum antibiotics remained stable over a long period of time despite a wide disparity among sellers in production costs, despite reductions over the period in such production costs, substantial difference between production costs and sales prices, fluctuations in market shares among the sellers, and changes in overall demand for broad spectrum antibiotics.

There has been evidence of so-called "production costs" or "factory" or "standard" costs from records kept by the companies, and comparisons in these records between such costs and selling prices. Many of these records omit many factors that should be included in costs in order to compute net profits. Such factors, without exhausting them, were research, promotion expenses, and other kinds of costs. You should have these omissions in mind and take them into account when you consider the figures I have just mentioned.

Taking such figures, the government sought to show that the gross profits they reflect were substantially greater for the products here in question than for other products made and sold by the defendants. In addition, from similar data for Squibb and Upjohn, the government has sought to show that costs of those two companies were far higher than those of the

defendants, and the government argued for an adverse inference from the evidence that the prices of all five companies tended to be uniform despite these cost differences.

The government claims that there is further evidence of a lack of price competition in the fact that the prices of broad spectrum antibiotics were maintained over a long period of time at an artificial level which enabled Squibb and Upjohn to earn normal profits despite their higher costs, while the defendants were able to earn what are alleged to have been unreasonably high profits.

You will understand that it is the fact to which those allegations relate rather than the words in which they are couched which I take from the government contentions which are critical items for your consideration.

On this same subject, there is evidence of overall net profit figures for Cyanamid by various product groups, and gross and operating profit figures comparing Pfizer's antibiotic drugs with its other products.

Relying upon the data offered by the government, Bristol has argued that its profits on tetracycline were actually in line with its profits on other products. Similarly, Pfizer, at the end of the case, undertook to show that Terramycin and tetracycline did not in fact yield disproportionately high profits in comparison with other products.

More generally, the defendants maintain that the evidence in question does not have the meaning attributed to it by the government and that it does not warrant the government's inferences in any event. Defendants emphasize that the cost data taken from the company records relate only to partial costs rather than total costs of production.

They maintain that comparisons between such costs and selling prices lead to distorted conclusions as to so-called gross profits. Properly understood, the defendants say, the figures show profits that are not meaningful at all and not in any sense unreasonable or unusual or artificial.

Furthermore, the defendants contend, it is neither good law nor good economics to demand a close and uniform relationship between production costs and profits. They point out that competition in the marketplace commonly results in uniform prices even though the various sellers who compete would not normally be expected to have identical or even closely identical costs of production.

In considering this subject, as with others, you will want to weigh and appraise all the evidence and arguments, including all the data from defendants' files as have been made available comparing gross profits or other margins on broad spectrum antibiotics and any comparisons that seem to you to be significant between these figures and others in evidence that have been submitted to you.

On the basis of all the evidence, the ultimate facts about the level and quality of prices and profits and the proper inferences as to the offenses alleged in the indictment, are to be determined by you, the members of the jury.

First, it is for you to decide, appraising all the facts and figures that have been placed before you, whether the prices charged and the profits earned by the defendants were unusual or artificial or extraordinary or unreasonable in the sense in which I have undertaken to define these alternative expressions for you.

If you answer this question in the negative, this is enough to eliminate these price and profit contentions

from the evidence in support of the government's case.

If you answer the question affirmatively, if you decide that the prices were unreasonably high in the sense in which that phrase applies to this case, you must then weigh the impact, if any, that this determination should have on your decision of the ultimate questions in the case.

Unreasonably or extraordinarily high prices or profits charged uniformly by competing sellers over a substantial period of time may be evidence, taken with all the other circumstances of the case, supporting an inference that the parties had an agreement rather than a competitive situation with respect to prices.

Such evidence, in the context of the whole case may, and I emphasize may because this is for your judgment, may also support the charges in Counts 2 and 3, alleging, as you recall, conspiracy to monopolize and the achievement of an unlawful monopoly. All of these questions as to this item of evidence are left with the inferences you find you should draw in your good judgment.

You will recall in this connection my last reference to the count relating to monopolizing, that the crime of monopolization requires proof in this case of a combination or conspiracy to monopolize, plus joint possession of monopoly power by the members of this combination or conspiracy, and that I have defined monopoly power as being the power to control prices and exclude competition. In this case I have indicated that it is relevant to show that the defendants earned unreasonably high profits as part of the government effort to show that they conspired to obtain and did obtain a monopoly. The success of that effort is for you to judge.

To conclude finally on this subject of prices as alleged means and methods of effectuating the conspiracy, let me remind you that you should consider all of the documentary evidence and testimony bearing on what prices were actually published and actually charged in the various markets; what price changes were in fact made; what considerations entered into the various decisions with respect to prices; the competitive situation in which prices were charged; the market conditions in the various classes of trade and various markets; the peculiarities and purchasing habits of the different kinds of customers in the various markets; and all other matters which might have affected businessmen's decisions with respect to pricing.

Take all of these things into account along with the evidence you have heard on the relative levels of prices, costs and profits in reaching your ultimate judgment as to whether this evidence tends to show the presence or absence of the conspiracy charged by the government and whether it tends to show, along with the other pertinent elements, the existence of monopoly power as charged in Count 3 of the indictment.

Now, since you have waited so patiently and since I am approaching an end, and since we will need a recess when I do end, may I keep you and conclude this charge?

All right. As I told you, I finished with the subject of prices and I have concluded at this point the subject of means and methods as alleged in the indictment.

In discussing that subject, I have made some limited references to the evidence, and I want to mention now in the same limited way just a few additional categories of the evidence, and to leave you with some final thoughts about how these may enter into your final deliberations.

You have heard evidence about meetings held between principal officers of the defendant companies, and evidence concerning the events leading to, and things that happened at and after those meetings. You will recall that the government places the inception of the alleged conspiracy between Pfizer and Cyanamid at the meetings and negotiations of November 1953 leading to the licensing and bulk sales arrangements concluded at that time.

Similarly, you will recall that the alleged entry of Bristol into the conspiracy, along with Squibb and Upjohn, is dated from the time of the meetings between Schwartz and McKeen and others on December 14 and 15, 1955, when the agreements were negotiated.

I told you earlier that proof of a conspiracy does not necessarily require proof of express agreements or proof that the alleged conspirators had any face-to-face meetings at all. At the same time, meetings between competitors may supply, as you know, an opportunity to make either lawful or unlawful agreements. You will understand, however, that evidence of such meetings could not in itself establish the existence of any unlawful conspiracy. In weighing the significance and meaning of the meetings in this case, you will consider the extent to which you have heard legitimate business purposes for them, the events that came before, and the events that came after, the extent to which the conduct of any of the companies involved remained the same or changed in the times preceding and following such meetings, the public or private statements the parties may have made touching the subject matter of their meetings—and, as usual, and still important, all the surrounding circumstances.

Along with all the other evidence in the case, you have heard the sworn testimony of the principal officers of the three defendant companies, and you have heard each of them deny in broad terms that there was any understanding or agreement among them, either express or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. You must, obviously, give due and deliberate thought to this testimony, and ultimately attribute to it such weight as it merits in your impartial judgment. In performing this task, you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter. You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the conspirators did not believe they were violating the law or intend to commit such a violation.

This is by no means to suggest to you that you overlook or reject the sworn testimony of defendants' officers. That's for your judgment, not mine. The point being made here, as you understand, is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you.

I come to one final observation I want to make in these instructions about something included in the evidence you have heard. There has been evidence

about Parke, Davis and about Chlormycetin, the broad spectrum antibiotic which is alleged to have comprised part of the market involved in this case. You have learned that Parke, Davis was a substantial factor in that market, and I have mentioned the possible significance of that situation as it affects the question of monopoly and may affect other issues in this case. We have heard of various respects in which the practices of Parke, Davis as to dosages and prices and marketing techniques paralleled those of the defendants and of Squibb and Upjohn. We have also heard some evidence and argument concerning the differences between Parke, Davis and the defendants on trial here. You are aware, as counsel for both sides have stated, that Parke, Davis is not alleged to have been a member of the conspiracy charged by the government.

Now, insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts about that subject have been placed before you and are part of the total evidence you may consider in reaching your judgment. However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in spectulating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom.

I must remind yon now that my comments touching the evidence have been limited, and have served limited and special purposes. They have been presented to you to give you such assistance as I could in formulating the issues you are to consider and in

outlining the extent to which, and the purpose for which, particular kinds of evidence may be deemed to be relevant. I have omitted many things in this discussion so far as the evidence is concerned. The fact that I have mentioned something should not magnify its importance to you; that fact that I have omitted things should not make them seem unimporant to you. Some things I have mentioned may seem in the end to be of relatively little consequence in your controlling judgment; things I have not mentioned may turn out to be relatively decisive in that judgment.

If anything I have said about the evidence differs from your recollection, remember it is your recollection that controls. If anything I have said creates some uncertainty for you, ask for the pertinent exhibits or ask to have the pertinent testimony read to you. I remind you, in short, that your recollection of the evidence, the weight to be given to any particular item of evidence, and the ultimate impact of the whole record in finding where the truth lies are matters for your exclusive and sovereign judgment.

Let me remind you also, though it is repetitious, that while we necessarily speak of things one at a time, your final decision, as counsel for both sides have mentioned to you, must rest ultimately upon your appraisal of this large record viewed as a whole. Whichever way your ultimate verdict may go, it should be a verdict based upon a total picture, constructed from all the evidence in the case. If that whole picture leads you to the belief that these companies engaged in normal and lawful competition, or leaves you with a reasonable doubt whether the government has proved otherwise, then it is your duty to acquit. If that total picture, taking all the separate details together, established beyond a reasonable doubt any or all of the

offenses charged, then, as I have said, it becomes your duty to convict.

A few more general things and I will be through, members of the jury.

On the subject of credibility. In resolving conflicts in and about the evidence you have received, you will obviously be concerned with this subject of credibility, with appraising the credibility of the witnesses who appeared and testified before you. Problems that we put under the heading of credibility comprise one of the most basic and lasting reasons for our bringing twelve non-professional people of good sense and wide experience into the courtroom to decide issues of the kind you are having before you.

There is nothing technical or legalistic about this subject of credibility. Jurors are called upon, as I have said, to bring into the courtroom the everyday good sense they use in conducting their own serious affairs. You have heard the witnesses on the stand, and you have observed the manner in which they testified. It is for you to ask yourselves how each witness impressed you. Did he appear to be truthful, candid, frank, forthright? Did he appear to know what he was talking about? Did he, above all, impress you as having a purpose to report his knowledge accurately and truthfully?

These are the kinds of familiar questions you will ask yourselves and reason on together in deciding which witnesses gave you honest and correct accounts of the facts.

In determining the extent to which you will credit the testimony of any particular witness, you may consider the inherent probability and consistency of that testimony, its corroboration or lack of corroboration by other evidence, including the documentary exhibits that have been placed before you.

Your experience tells you that the credibility of a person may be affected by the nature of his interest in the subject matter. You would surely have this in mind whether or not it was mentioned in instructions. And you would equally know from your own experience that while interest may affect a person's testimony, the fact that a person is interested is not a ground in itself for concluding that his testimony is not reliable. If that were so, we would never listen to interested people in trials in our courts. I simply mention this factor of interest, among all the others, as things that may enter into your appraisal and deliberations concerning credibility.

If you conclude that any witness has been discredited in any degree, it is your exclusive province to give his testimony such credence as you think it merits. If you find that a witness has wilfully testified falsely to any material fact, this may lead you to disregard all his testimony, or you may accept such part of his testimony as you believe worthy of acceptance. This is a matter, like the others, for your good sense and your good judgment.

You will remember in this connection that no witness is entitled in advance to greater or lesser credence because of the party that called him or because of his employment or other associations. The fact that a witness was called by the government does not in itself entitle his testimony to more weight or credence than that of any other witness who might appear before you. Similarly, the fact that witnesses are or have been associated with the defendants should not in itself diminish or enhance their credibility. All the witnesses must be judged by the tests of common sense and your experience in dealing with people and determining the extent to which you feel you may rely upon them.

Now, I have told you many times during our weeks together to refrain from discussing the case until the evidence and the arguments were all in. That instruction is, of course, about to be exactly reversed. When you go to the jury room, it is expected that you will discuss the case fully and exchange views with your fellow jurors. This is obviously the essential purpose and essence of jury deliberation to discuss and consider the evidence together and listen to the arguments of your fellow jurors. It means, naturally, that you will present your own point of view as well as listening to and considering others.

If after discussion with your fellow jurors you find that an opinion you had tended to hold is erroneous, you must not hesitate to change it in all good conscience. The objective is to reach agreement, if you can, but only on the evidence and only if you can do so without violence to your individual judgment.

So while you should fairly consider all points of view that you hear in discussion, you are not expected to yield your conscientious opinion simply because you are outnumbered or outweighed. Your vote has to be determined in the end by what you are convinced is the correct way to decide the facts under the evidence, under your oath, and under the instructions I have given you.

Now, you undoubtedly know that in order to return a verdict your decision must be unanimous, and I remind you that in seeking a verdict you must consider each defendant separately in connection with each of the three counts in the indictment. Ultimately, therefore, you will report three separate determinations for each defendant, or a total of nine in all.

Let me remind you for the last time that no defendant may be convicted in this case on any of the counts unless you find at least two of the defendants guilty

on that count. Accordingly, your verdict on any of the three counts may be an acquittal of all three defendants, a conviction of all three, or conviction of two and acquittal of the remaining defendant. You may not on any count find one defendant guilty and the other two not guilty.

Finally, as to the mechanics and equipment for your work together, it is plainly not necessary or suitable to send all the many exhibits with you to the jury room. If and when you have need for any of them, send a note and we will supply them to you, though I might say, it might take a bit of time for able counsel to collect them, but we will do that at your request. If you need to hear any of the testimony again, send a note and we will have it read to you. If you find during your discussion that anything said in these instructions, as well may be, requires clarification, send a note about that, and I will attempt to give you such additional or repeated guidance as I can.

* * * * *

I have concluded that you have enough in the way of instructions. I will ask you to remember that in addition to trying to put the case together as a whole, you must try, as nearly as you are able to, to consider those instructions as a whole and not break them into too little pieces and you try and decide the case.

I think I must or should emphasize to you finally, and again, that when I have touched on evidence, it has been primarily to try to bring these issues into focus and try to help you with your difficult task. I have tried to give you evidence relating to particular issues more or less on both sides, but it is not only my job but the fact about my own personal condition on this case that I am absolutely impartial, and I make no effort to intrude on your province of finding a ver-

dict, and so, if ever I have missed—and I stated this generally—in trying to tell you what evidence seemed to be on each side of any question, please remember that it is for you to weigh all the evidence, and not be guided or concluded or controlled in any way by my illustrative or partial pictures of that evidence for the special purposes of my instructions.

It is your weighing, your recollection, and your thorough canvas of that evidence that counts. All I can say, as earnestly as I can put it, is that I mean exactly this: In this case, neither the judge nor any member of the public, official or otherwise, is pushing you toward or expecting any determination one way or another, except your impartial determination of what you think to be the truth in the light of this case under my instructions as you find them from all the evidence.

* * * * *

APPENDIX E

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of April, one thousand nine hundred and seventy.

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, BRISTOL MYERS COMPANY, DEFENDANTS-APPELLANTS, JOHN E. MCKEEN, WILBUR G. MALCOLM, FREDERIC N. SCHWARTZ, DEFENDANTS

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO, *Clerk.*

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. [redacted] 70-72

UNITED STATES OF AMERICA, *Petitioner,*

vs.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY and BRISTOL-MEYERS COMPANY, *Respondents.*

BRIEF OF THE STATES OF CALIFORNIA, HAWAII, KANSAS, NORTH CAROLINA, OREGON, UTAH AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1286

UNITED STATES OF AMERICA,
Petitioner,
vs.
CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY and BRISTOL-MEYERS COMPANY,
Respondents.

BRIEF OF THE STATES OF CALIFORNIA, HAWAII, KANSAS, NORTH CAROLINA, OREGON, UTAH AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The States of California, Hawaii, Kansas, North Carolina, Oregon, Utah and Washington file this brief in support of the petition of the United States seeking a writ of certiorari. This brief is submitted under the provisions of Rule 42.4 of the Rules of the Supreme Court.

The States' interest in this case is grounded on the actual and potential impact of the Second Circuit decision on the development of the criminal aspects of state antitrust laws. In addition, the States are concerned with the possibility that the Second Circuit decision may be applied to treble damage actions.

STATEMENT

Numerous states have antitrust laws which provide for criminal sanctions. In recent years, states have greatly increased their activities in this area and have created or expanded units devoted to antitrust enforcement procedures. This increased activity is, however, still in its incipiency. State antitrust laws are, in most cases, still in an early stage of development compared to federal law. Due to both historical development and the very large number of federal decisions, federal law has achieved primacy in the antitrust field.

In any state criminal prosecution, it can be assumed that the Second Circuit decision, if allowed to stand, will be controlling.

Also, there is the possibility, particularly in state courts with their paucity of antitrust experience, that this decision in a criminal case will be applied in subsequent civil litigation. This could have a chilling effect on the bringing of treble damage actions by states and thus reduce the efficacy of these private enforcement actions.

REASONS FOR GRANTING THE WRIT

The States fully support the arguments of the Solicitor General and join in requesting that the petition for a writ of certiorari be granted.

In addition, the States would argue that the Second Circuit's restrictive opinion would have an inhibiting effect on every aspect of antitrust law enforcement.

---

1. STATE ANTITRUST LAWS ARE DIRECTLY RELATED TO FEDERAL ANTITRUST LAW.

Some state antitrust laws are patterned directly on the federal statutes. The State of Washington's Unfair Practices Act is identical to the Sherman and Clayton Acts, except for the interstate commerce requirement in those acts (Chapter 19.86, Revised Code of Washington). The States of Hawaii, North Carolina and Utah also have anti-competitive statutes which are identical to the federal statutes, save for the interstate commerce requirement. For such states, federal decisions interpreting identical, or nearly identical, language will clearly carry great weight with state courts. In fact, Chapter 19.86.920 of the Revised Code of Washington provides that it is the intent of the legislature that courts in interpreting the Unfair Practices Act should be guided by decisions of federal courts interpreting federal statutes which deal with the same matters. In a case in which it was argued that the federal government had preempted the antitrust field, the United States Department of Justice filed an amicus curiae brief taking

the position that there was no pre-emption. The Washington court found a lack of pre-emption. *Washington v. Sterling Theaters Co.*, 64 Wash.2d 761, 394 P.2d 226 (1964).

Even where the state language varies from the federal statutes, the federal decisions may be applicable. The California Supreme Court has held federal decisions to be applicable in interpreting California's Cartwright Act (Business and Professions Code section 16700 et seq.) even though its language varies almost totally from the federal language. *Chicago Title Insurance Co. v. Great Western Financial Corp.*, 69 Cal.2d 305, 70 Cal.Rptr. 849, 444 P.2d 481 (1968).

These acts provide criminal sanctions. California's Business and Professions Code, section 16755(a) provides:

> "Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, is punishable by a fine of not less than five hundred dollars ($500) nor more than fifty thousand dollars ($50,000) or by imprisonment for not more than one year, or by both such fine and imprisonment."

The Hawaii, North Carolina, Utah and Washington statutes provide for the same criminal remedies as

the federal acts.[1] When future criminal prosecutions are brought or reviewed under these state statutes, the Second Circuit decision almost certainly will be considered to be controlling by state courts. Its restrictive effect will encompass state as well as federal criminal prosecutions.

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2. FEDERAL DECISIONS ARE, AS A PRACTICAL MATTER, BINDING ON STATE ENFORCEMENT AGENCIES.

The impact of federal decisions on state proceedings is greater than indicated by statutory language or state court decisions. Federal decisions are more than applicable to state proceedings; they are, in effect, controlling. While state activity is increasing greatly in the antitrust field, it is still small in relation to the quantity and history of federal activity. Very frequently there are no state decisions on a point which is well settled in federal law.

Because these conditions will tend to give great, if not controlling, weight to applicable federal decisions, undoubtedly it will be very difficult to get a state court to reach a different conclusion than that previously reached by a United States Court of Appeals.

---

3. STATE ANTITRUST LAW IS INTERSTITIAL IN RELATION TO FEDERAL ANTITRUST LAW.

State and federal antitrust laws have overlapping coverage in many areas but state law alone controls

[1] In 1968, North Carolina successfully prosecuted a violator under the state antitrust law.

where the violations do not affect interstate commerce. 15 U.S.C. §§1 and 2; *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 224 (1940). Thus, a restrictive federal decision affects even those combinations in restraint of trade which would not be subject to federal law.

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4. THE SECOND CIRCUIT DECISION MAY BE MADE APPLICABLE TO CIVIL PROCEEDINGS.

Even though this is a criminal case, its rule may well be applied to pending or future civil antitrust actions.[2]

Treble damage actions are intended to be private enforcement actions. As Justice White said in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969):

> "Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."

A decision which would make successful prosecutions of such actions more difficult would seriously restrict total enforcement of the antitrust laws.

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[2]The criminal case here in question is in fact the progenitor of a number of currently pending civil treble damage actions. These actions have been brought by a variety of plaintiffs, ranging from governmental entities, through agricultural purchasers of tetracycline to competitors and insurers. Pursuant to court order, plaintiffs in these actions have formed a national steering committee. That steering committee has indicated that it fully supports both this brief and the brief of the Solicitor General.

State interest in treble damage cases has increased greatly since the electrical conspiracy cases, The entry of the states as well financed plaintiffs with very large claims has given a new efficacy to the concept of treble damage actions as vehicles of private enforcement of the antitrust laws.

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5. THE SECOND CIRCUIT DECISION DOES NOT PROVIDE SUFFICIENT GUIDELINES FOR FUTURE RULINGS BY TRIAL COURTS. -

The States fully support and agree with the arguments of the Solicitor General. However, the States would particularly stress the lack of guidelines provided by the Second Circuit decision. It is respectfully submitted that the decision is essentially conclusionary in reversing the trial court decision and does not provide the standards necessary for the guidance of trial court judges in the future.

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6. BECAUSE OF THE GREAT AND WIDESPREAD IMPACT OF FEDERAL DECISIONS, THOSE WHICH RESTRICT ENFORCEMENT OF THE ANTITRUST LAWS SHOULD BE CAREFULLY SCRUTINIZED.

The impact of federal antitrust decisions is both great and far reaching. They pervade every aspect of federal, state and private enforcement of the antitrust laws.

The petition of the Solicitor General has analyzed the Second Circuit decision and has succinctly stated

the problem presented by that decision.[3] The decision is clearly restrictive in nature and would inhibit all future enforcement of antitrust laws where the enforcement is to be based on circumstantial evidence.

While all appellate antitrust cases are of interest to the antitrust bar, we do not argue that they are all proper subjects for the granting of writs of certiorari. However, those cases which would place new barriers in the way of effective enforcement of the antitrust laws by the federal or state governments should be carefully examined before they are allowed to stand.

CONCLUSION

For the reasons set forth above, these States respectfully urge that the petition of the United States for a writ of certiorari be granted.

Dated, February 25, 1971.

Respectfully submitted,

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Attorneys for the State of California, as Amicus Curiae and on behalf of the following states:

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[3] "As we show below, the instructions that the court of appeals' decision requires a district judge to give in cases of this type would place an unwarranted and serious burden upon the government in the prosecution of criminal antitrust cases involving price fixing and other restrictive practices in oligopolistic industries, where there rarely is direct proof of the conspiracy and the government almost invariably has to rely upon circumstantial evidence." Petitioner's Brief for Certiorari at 14.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 70-72

UNITED STATES OF AMERICA,

Petitioner,

—against—

CHAS. PFIZER & CO. INC., AMERICAN CYANAMID COMPANY and BRISTOL-MYERS COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 31, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1286

UNITED STATES OF AMERICA,

Petitioner,

—against—

CHAS. PFIZER & CO. INC., AMERICAN CYANAMID COMPANY and BRISTOL-MYERS COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below and Jurisdiction

The opinions below and the basis for this Court's jurisdiction are set forth in the petition (Pet. 1-2) and appendix thereto (App. 1a-43a).*

Questions Presented

The petitioner contends that there are two questions presented and that the first one is "whether * * * the court of appeals applied an improper standard of review by considering particular language in isolation rather than

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* App. refers to the appendix to the petition for certiorari; R. refers to volumes I through XXI of the joint appendix in the court of appeals.

evaluating the charge in its entirety in the light of all the evidence and the defendants' arguments to the jury." (Pet. 2)

We disagree. There is nothing in the opinions below to support the assertion that the court of appeals considered particular language "in isolation" or failed to "evaluate the charge in its entirety" or failed to consider "all the evidence and the defendants arguments to the jury." To the contrary, the majority below refers to its "review of the *entire charge*" (App. 17a) (italics ours) and concludes with the express statement:

> "A review of the *entire record* leads to the conclusion that the judgments of conviction against Cyanamid, Pfizer and Bristol must be reversed and that a new trial be had as to them." (App. 33a) (italics ours)

In the second question presented the petition purports to describe each of the grounds relied on by the court of appeals. The attempt to summarize the holding in a few words is neither complete nor entirely accurate, as will appear in our discussion of the rulings in question.

Statement

The petition states the facts "in the light most favorable to the verdict" (Pet. 4). Whatever the appropriateness of such an approach if this Court were now called upon to decide the sufficiency of the evidence to support the verdict (*Glasser* v. *United States,* 315 U.S. 60 (1942)), the usefulness of such a one-sided statement is dubious in a case such as this, where the court of appeals' decision was based on prejudicial errors in the charge to the jury. A

balanced synopsis of the facts is contained in the first opinion of the court of appeals.

Any suggestion that this was an "easy" case for conviction does less than justice to the record. Without embarking upon what necessarily would be a long statement of the facts contained in the 12,000 page record of this case, we point to objective indicia which show that this was indeed a "close" case.

1. The majority below clearly regarded it as a close case. They referred to it in the opinion denying rehearing as "a criminal case so close as this" (App. 42a). Even the dissenting judge conceded that the government's evidence was "not overwhelming" (App. 33a).

2. In denying rehearing, the majority below noted that, although the court had not reached the defendants' contention as to insufficiency of the evidence, the majority now inclined to the view "* * * that there was insufficient evidence to warrant submission to the jury of the issue whether [Bristol] had conspired with Pfizer and Cyanamid to exclude others from the tetracycline market." (App. 42a)*

3. The jury's deliberation extended over a period of two days and late into the night of each. It twice requested to be read parts of the evidence and to be given some of the exhibits (R. 5071a).

4. Prior to the indictment herein, essentially the same charges and evidence were the subject of a Federal Trade Commission hearing even more lengthy than the trial below. *Matter of American Cyanamid, et al.* (FTC Docket No. 7211). The Hearing Examiner

* This statement by the majority below expressly refutes the petitioner's assertion that "there can be no question that the proof here supports the jury's verdict" (Pet. 15).

in a 195 page Initial Decision discussing the evidence in detail concluded that none of the charges had been sustained.

5. On an appeal to the Commission, the Initial Decision was unanimously affirmed as to the exclusionary aspects of the conspiracy charge but not as to the pricing aspects (63 FTC 1747). The Commission's decision as to the pricing aspects was vacated by the Sixth Circuit on the ground that the Chairman should have disqualified himself (363 F.2d 757). In subsequent proceedings before the Commission the earlier findings as to price fixing were dropped by a 2-2 vote (Trade Reg. Rep., 1967-70 Transfer Binder, ¶ 18,077).*

Summary of Argument

This is not a proper case for review by the Supreme Court. The decision below turned almost entirely on the particular facts of this case and the treatment thereof by the trial court in instructing the jury. No important questions of law are presented to this Court. Moreover, the decision merely remanded the case for new trial; and questions not reached by the court of appeals may well require a new trial even if the present decision were reversed. There are no reasons of public policy calling for departure from the standards set out in Rule 19 of this court (Point I).

The court of appeals applied a proper standard of review and correctly held that errors in the conduct of the

* The Commission did reaffirm findings that Pfizer and Cyanamid separately had misconducted themselves before the Patent Office. Orders entered pursuant to this finding were upheld on appeal. 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

trial, when taken as a whole, deprived the defendants of a fair trial. (Point IIA)

Evidence favorable to the defense was dealt with in such a way as to discourage the jury from giving it adequate attention. This was true of (i) the evidence as to the parallel conduct of Parke, Davis & Company which was affirmatively asserted by the government (without the knowledge of the jury) not to have been a conspirator, and (ii) the testimony of the principal officers of the defendants about certain meetings which were of crucial importance in the case. (Point IIB, 1 and 3)

By contrast, inflammatory evidence heavily relied on by the prosecution was emphasized and its limited significance in the case was not made clear. This was true of evidence as to alleged profiteering and alleged misconduct in the Patent Office. (Point IIB, 2 and 4).

Certain patent licenses having a vital importance in the case were described in the charge in a way which misinformed the jury as to their legal effect. The misleading nature of the charge in this respect was recognized by Judge Hays as well as by Judges Moore and Friendly. (Point IIB, 5)

The trial court failed to make clear to the jury that nearly all of the evidence as to Bristol's market behavior related to a period when it admittedly was not a conspirator. This error was compounded by an instruction which seemed to leave the jury free to find a conspiracy involving Bristol during a period when it was admittedly innocent. The trial judge himself conceded that this part of the charge might have had the effect of misleading the jury. (Point IIB, 6)

ARGUMENT

I.

No Adequate Reasons Are Given for Granting the Petition and There Are Affirmative Reasons for Its Denial.

Rule 19 of this Court sets forth "Considerations Governing Review on Certiorari." Not one of the reasons set forth in the Rule is applicable to this case. Indeed, the petition concedes that

> "On its face, the initial opinion of the court of appeals appears to involve only the application of settled principles of antitrust and criminal law to these particular facts; it does not cite a single decision." (Pet. 13)

There are, moreover, at least three affirmative reasons why the petition should be denied.

(1) The errors which the court of appeals found in the charge to the jury were either errors of fact—instances where the trial judge had misinformed the jury as to the evidence, over-emphasized some evidence and disparaged other evidence, and failed to give proper guidance in complex factual areas—or involved the now conceded mischaracterization of the legal effect of certain patent licenses.

(2) The decision below did not end the case, which was remanded to the district court for a new trial.

(3) The court of appeals did not consider all the grounds for reversal urged by respondents. The majority noted that the respondents had advanced "many other contentions" which were not reached (App. 42a). These include assertions of errors in ruling on evidence, of additional errors in the charge, and of error in permitting the case to go to the jury at all. Thus, if the decision below were reversed, the court of appeals "would be obliged to consider" the other contentions of respondents which have not been passed upon (App. 42a). As to one of those contentions, the insufficiency of the evidence, the majority inclined to the view that it would require a new trial (App. 42a). Even a reversal of the decision below, therefore, would not bring finality but would only insure further appellate review which appears likely to end with a direction for a new trial in any event.

This Court has said: "We do not grant a certiorari to review evidence and discuss specific facts"* and where "the Court of Appeals [has] remanded the case, it is not yet ripe for review by this Court."** We are aware of exceptions to each of these general rules. But we submit that in the absence of extraordinary grounds, a petition should be denied which asks the Court to review a decision (1) dealing almost entirely with evidence and specific facts (2) which remands the case for a new trial where (3) a reversal would call for further appellate proceedings and the distinct possibility of a new trial.

In the face of these formidable obstacles to the issuance of the writ, the petition urges only (1) that this is an un-

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* *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

** *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

usually "important" case (Pet. 13); (2) that it was tried by a "highly regarded district judge" (Pet. 13); and (3) that the standards established by the court of appeals for instructions to a jury will place a serious burden on antitrust enforcement (Pet. 14, 16).

These contentions do not survive analysis.

(1) There are no "important" legal issues involved, and such extrinsic importance as the case may once have had has been dissipated by intervening events.

During the indictment period there were only five companies making or selling tetracycline. This market structure no longer exists. As a result of the parallel Federal Trade Commission proceeding, any applicant may now obtain an unrestricted license under the tetracycline patent at a royalty rate of 2½%, and this patent now has less than one year to run. The patents on the other three drugs involved in the case have all expired. The result is that the market has been widely opened up, and in the case of tetracycline there are more than 50 companies making or selling it.

Most of the treble damage actions brought by plaintiffs who could have relied upon a conviction in support of their claims have been settled pursuant to offers made prior to the reversal. Most of these settlements have already been approved by the district court as fair and reasonable. 314 F. Supp. 710 (S.D.N.Y. 1970). The balance of the settlements are before the district court for approval. The court has not ruled on them, but has held a hearing at which no objections were raised. It is true that some cases have not been settled, but their pendency

does not indicate that this criminal proceeding remains important.*

(2) We concede that the district judge is "highly regarded," as we are sure petitioner would concede that Judges Moore and Friendly are "highly regarded." But this consideration surely should not influence the Court in granting or denying the writ.

(3) The decision below set no difficult or new standard for jury instructions. It cannot be seriously argued that prosecutions should be facilitated by upholding convictions where there has been a failure to afford a fair trial. The court of appeals demanded no more than the petition itself says is the duty of the trial judge—that is, "to explain fairly and clearly in a way that the average man can understand what the law is, what issues the jury must decide, and upon what basis it should do so." (Pet. 15)

In a recent brief successfully opposing petitions for certiorari by defendants whose convictions had been affirmed by the Third Circuit (*American Radiator & Standard Sanitary Corp.* v. *United States*, Nos. 1047-1050, O.T. 1970, *cert. denied*, 39 U.S.L.W. 3376 (March 1, 1971)), the government argued that jury verdicts will not be reversed "unless the reviewing court is persuaded that misconduct of the trial prevented the jury from determining the case on a dispassionate consideration of the evidence." (An-

* The *Amicus* brief filed herein by the seven states which declined to settle makes no claim that this case will have a direct bearing on their actions against defendants. Their primary contention is that the decision below will have a great effect on state law. This is difficult to believe, since the petitioner does not seriously argue that this case will have any great effect even on federal antitrust law.

swering Brief, p. 13) The court of appeals in the present case *was* so persuaded. The government in the *American Radiator* case urged that the Third Circuit "correctly applied this standard in discharging its difficult review function", and that therefore this Court should not review the case further (Ibid.). In the present case the court of appeals also discharged "its difficult review function," and there is no occasion for further review merely because the result was adverse to the government.

II.

The Decision Below Is Correct and Does Not Raise Points of Law Which Warrant Review by This Court.

A. *The Nature and Scope of the Decision*

There is not the slightest ground for suggesting that the court of appeals, in disregard of its appellate responsibility, fragmented the record and considered particular language in isolation instead of evaluating the charge in its entirety. On the contrary, the opinion reveals that the court weighed the charge as a whole in the light of the complexity and difficulty of this particular case and concluded that the errors in the conduct of the trial, "when taken as a whole, were sufficient to deprive the defendants of a fair trial." (App. 41a)

The court held that evidence favorable to the defense was inadequately dealt with, and was treated in a way which tended to mislead the jury as to its significance. Inflammatory material relied upon by the prosecution as circumstantial evidence supporting an inference of conspiracy was accorded much more generous and complete

treatment. The effect of one of the important agreements among certain of the defendants was affirmatively misstated in a manner which erroneously tended to support contentions of the government. Requests to charge which, if granted, would have made the total charge more balanced, fair and accurate, were denied. Thus the reversal was based upon the cumulative effect of numerous errors "when taken as a whole."

As the court of appeals recognized, this was a case in which the charge to the jury was of unusual importance.* In the mammoth record there was no direct evidence whatever of the conspiracy alleged; all the direct evidence was inconsistent with conspiracy. The written agreements among the defendants contained nothing that required explanation; on the contrary, the prosecution explicitly conceded that each of these agreements was lawful on its face (R. 280a).

The circumstantial evidence relied on by the prosecution was complex in nature** and could be properly evaluated by the jury only if it received from the court a charge which would provide a clear basis for appraising the meaning

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* The jury requested and were given copies of the transcript of the charge for use during the deliberations (R. 5051a, 7345a). After the verdict, the jurors were given permission to take these copies home as a memento of the trial (R. 5077a). The importance of the charge was accentuated by the fact that the trial court over defense objections allowed almost two weeks to elapse between presentation of the last evidence and submission of the case to the jury (R. 4606a-14a), as a result of which memories of the evidence must have faded and heavy reliance must have been placed on the court's comments.

** As one juror put it in a note to the court during trial, "* * * the dramatis personae is large, the language unfamiliar, the plot winding and convoluted, the actors sometimes slurring and the text very long." (R. 2388a)

and significance of the evidence. The gist of the decision was that the trial court's treatment of the various subjects of evidence did not provide the jury with such an adequate guide for their deliberations, and, indeed, dealt with a number of subjects in ways that were prejudicial to the defense.

B. *Particular Defects in the Trial Found by the Court of Appeals**

1. The trial court's treatment of the evidence as to Parke, Davis

The market involved in this case consisted of four broad spectrum antibiotic drugs, only three of which were produced or sold by any of the defendants. The fourth, Chloromycetin, was manufactured and sold by Parke, Davis & Company and accounted for some 24% of all sales of broad spectrum antibiotics during the indictment period (Pet. 4-5; R. 10244a). These four drugs were "clinically interchangeable" (Pet. 4).

One of the principal circumstances relied upon for an inference of conspiracy was the fact that the defendants followed substantially parallel policies and practices in the marketing of their broad spectrum antibiotics. Each refrained from granting patent licenses or from selling its patented products in bulk, save in exceptional circumstances. Their list prices were substantially identical and remained constant over a considerable period of time.

Government counsel argued strongly that this market behavior of the defendants was evidence of conspiracy not to grant licenses, not to sell in bulk and to fix and maintain

* We deal with these rulings in the same order as the petition.

prices. A necessary premise of this contention was that a company acting independently and without conspiracy would have acted differently.

The validity of this premise was put in question by the undisputed evidence as to the market behavior of Parke, Davis. Without the knowledge of the jury, which was not present, government counsel affirmatively asserted that it was not a party to the alleged conspiracy—it "absolutely was not" a conspirator (R. 4527a). And the undisputed evidence showed that Parke, Davis did the very things that were relied upon as evidence of conspiracy on the part of the defendants: it granted no patent licenses, it made no sales in bulk and its list prices were identical to those of the defendants for nine years through the middle of 1960.

Parke, Davis' status as a non-conspirator was stated unequivocally during the trial (but out of the jury's hearing) as follows:

> "The Court [addressing government counsel]: • • • Let me ask you: What do you think about the situation of Parke, Davis in this case? There has been a memorandum that you haven't responded to about the significance of Parke, Davis' conduct, same prices, same general business behavior, there is no charge that it is a conspirator and I think I can fairly read the statement of the Government, as being a concession that Parke, Davis was not a conspirator.
>
> "Mr. Sklarsky: It absolutely was not, your Honor. We state that on the record.
>
> "The Court: You not only concede that, you assert it?
>
> "Mr. Sklarsky: Yes, your Honor." (R. 4526a-27a)

In the same colloquy the trial court stressed the difference between such an affirmative assertion of innocence and

a mere failure to indict. When government counsel suggested that the jury simply be told that the fact that Parke, Davis was not indicted was of no consequence, the court responded:

> "The Court: No, but I can't let it go at that, when you have announced on the record that Parke, Davis was not a conspirator.
>
> "Mr. Sklarsky: Of course, your Honor.
>
> "The Court: You haven't just said, 'We didn't indict Parke, Davis.' That might be different. But you have stated that Parke, Davis was not a member of this conspiracy.
>
> "Mr. Sklarsky: That is right.
>
> "The Court: And then the evidence shows that it does many things similar to those proved against these defendants." (R. 4528a)

There was in this case, therefore, an admittedly independent and nonconspiratorial model with which to compare the behavior of those accused of conspiracy. The defendants intended to rely heavily upon the argument which had been foreshadowed by the trial court itself in the colloquy as follows:

> "Why shouldn't [the defendants] argue that this one large company, comprising a fourth or more of the market, you allege, behaving in very similar ways, has been declared by the Government to be a non-conspirator which helps to show that other people, behaving the same way, ought also to be viewed as not being conspirators?" (R. 4528a)

The jury was effectively prevented from considering such an argument by the court's treatment of this subject in the charge to the jury and by its rulings as to the scope of permissible argument.

1. The defendants requested an instruction which would have referred to the market behavior of Parke, Davis and would have told the jury that they were

> "entitled to consider the extent to which the evidence may show that Parke, Davis engaged in conduct which the Government claims proves conspiracy, and the further fact that no one claims that this conduct by Parke, Davis was pursuant to the conspiracy claimed by the Government." (R. 5555a)

The failure of the trial court to give the substance of this requested charge was found by the court of appeals to have been prejudicial (App. 24-26a).

2. Matters were made worse by the treatment of the Parke, Davis evidence in the charge as actually given. After referring to the evidence as to that company and stating that it was not alleged to have been a member of the conspiracy charged by the government, the court proceeded as follows:

> "Now, insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts about that subject have been placed before you and are part of the total evidence you may consider in reaching your judgment. However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom." (App. 109a)

This passage stressed the failure to indict and made no mention of the concession that Parke, Davis was not a conspirator, although in the earlier colloquy in chambers (quoted *supra*, pp. 13-14) the court had recognized that the concession was more significant than the failure to indict. The charge given seemed to suggest that there was some reason for nonindictment which was not relevant to the jury's considerations and as to which the jurors were not to speculate. And it went on to say that the evidence upon which the jury should focus was the evidence as to the behavior of the defendants rather than the evidence as to the behavior of Parke, Davis. The charge did not inform the jury of the true significance of the evidence as to Parke, Davis, and its net effect was probably to prevent the jury from giving the weight to that evidence which might properly have been given to it. The court of appeals concluded that it seemed "impossible to deny that the treatment which the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment." (App. 42a)

3. Moreover, in connection with the rulings on requests to charge the trial court placed certain limitations on the extent to which defense counsel could make arguments based upon the Parke, Davis evidence (R. 4646-47a). The exact extent of the limitations has never been entirely clear. In part at least, the trial court relied on the proposition that there was no presumption of innocence attaching to Parke, Davis, because it had not been indicted. Whether or not this was well founded, there was no necessity for injecting the question. The evidence as to Parke, Davis was relevant because that company was affirmatively as-

serted by government counsel absolutely not to have been a conspirator. This was true whether or not there was a presumption of innocence. The effect of the trial court's ruling was to inform defense counsel that arguments on this subject would be made at their peril. This had a substantial effect on the further conduct of the trial.

The petitioner contends that the jury must have considered the evidence relating to Parke, Davis because twice during the deliberations it requested evidence relating to that company (Pet. 21). It must be remembered, however, that each juror had the text of the charge before him during the deliberations. This must have been referred to, since the jury asked for the evidence by referring to page and line numbers of the transcript of the charge (R. 5071a). It is therefore clear that the jury could not have considered the evidence with a proper understanding of its significance.

2. The trial court's emphasis on assertions of profiteering

Despite the petitioner's implications to the contrary, the court of appeals did not pass on the admissibility of the evidence received as to costs and profits; rather, the court found that the trial court had unfairly emphasized this evidence. The petitioner's argument is basically designed to try to show that the evidence was relevant and that the trial court handled it fairly. The petitioner does not come to grips with the key to the court of appeals' decision, namely, that the constant emphasis on the allegations of profiteering, while at the same time the evidence relied upon by the defendants was being slighted and downgraded, presented the real possibility that the jury was diverted from consideration of the true issues.

The contention that defendants earned "unreasonably high" profits was constantly repeated by the government at trial. It bore little relationship to the economic theory espoused by the government at trial. It bore a close relationship, however, to the obvious sensitivity of the public to charges of profiteering by pharmaceutical manufacturers. Whatever may be the relevance of the cost and profit evidence (a point not decided by the court of appeals), there can be no doubt that the constant emphasis on allegations of profiteering in this trial was highly damaging to the defense. This loomed especially large in a case where the instructions to the jury seriously undermined the evidence relied upon by the defendants.

The margins of "profit" stressed by the government were the differences between bare production cost and selling price, without regard to the other necessary items of expense. The petitioner asserts that the facts as to the full costs of these drugs were kept from the jury "as a result of the defendants' own choice" (Pet. 23). In fact, the defendants sought to introduce studies showing the full costs, through government witnesses who had prepared them. Some of the studies were excluded on the ground that the witnesses were not the proper persons to authenticate them (R. 1847-49a). Others were excluded on the even more astonishing ground that the government had not had adequate opportunity to check the studies—which had been in the government's possession for seven years (R. 1986-90a). Despite the erroneous exclusion of these studies, the petitioner would place an obligation on the defendants not merely to put on a defense case but to put on a defense case to correct errors committed by the trial court.

3. The trial court's treatment of the officers' testimony

An understanding of the defects in the charge with respect to testimony of officials of the defendants requires a review of the subject matter and scope of their testimony, which in this brief can be given only in a most condensed form.

The most important episodes developed in the evidence were two sets of meetings between principal officials of defendants.

> (a) There were two meetings in November 1953, attended by top officials of Pfizer and Cyanamid, at which agreements were negotiated to clear up the patent block between the two companies and to settle the impending patent interference between them.
>
> (b) Some two years later, in December 1955, there were meetings between top officials of Pfizer and Bristol at which they negotiated and agreed upon a settlement of the patent infringement suits that had been brought by Pfizer against Bristol, Squibb and Upjohn.

The importance of these meetings was stressed by government counsel at all stages of the case. Paragraph 27 of the bill of particulars alleged that the arrangements made between Pfizer and Cyanamid in the meetings of November 1953 "initiated the conspiracy" (R. 298-300a). And paragraph 2 of the bill of particulars alleged that Pfizer and Cyanamid conspired "beginning in about November 1953" (R. 278a). The same paragraphs of the bill of particulars alleged that Bristol joined the alleged conspiracy "beginning in or about December 1955," and referred to the "illegal arrangements" negotiated between McKeen of Pfizer and Schwartz of Bristol in December

1955. It is undisputed that these passages in the bill of particulars refer to the meetings that have been described above.

This theory of the case was adhered to by the government at the trial. In his opening statement government counsel placed the formation of the conspiracy at one of the meetings of December 1953 in the following words:

> "• • • A meeting took place between Mr. McKeen of Pfizer and Mr. Malcolm of Cyanamid which the government contends resulted in an illegal agreement to violate the antitrust laws." (R. 1484a).

As to Bristol's adherence to the alleged conspiracy, government counsel told the jury in summation:

> "• • • [U]ntil the time they made that deal—Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal • • •." (R. 4867a)•

The importance in the case of the three principal officers is emphasized by the facts that each of them was personally indicted, that paragraph 27 of the bill of particulars alleged that each of them was responsible for the pricing policy of his company, and that government counsel asserted in argument throughout the trial that these men had formed or joined the conspiracy on behalf of their respective companies.••

• To the same effect, see also 1106-07a, 1130-31a, 1482a, 1495-96a, 4520-21a, 4829-31a, 4853-54a, 4999-5000a.

•• The charges against the individuals were dismissed by reason of their having received statutory immunity when the government, after their indictment, required them to testify before a grand jury.

Whatever may have been the possibility that a conspiracy could have been found to have arisen at some different time, or from the conduct of other people, the petitioner cannot escape the fact that at every stage of the case the government was seeking to establish a conspiracy initiated or joined by the principal officers of the companies at the meetings alleged. It follows that the truth as to what happened at these meetings was of crucial importance in the case. As the court of appeals concluded, the testimony about the meetings "was vital to any jury decision as to the existence of a conspiracy" (App. 16a).*

The government called as witnesses every officer of a defendant who attended any of the meetings, namely McKeen and Powers of Pfizer, Malcolm and Martin of Cyanamid and Schwartz of Bristol. Each of these men testified fully and in detail about the meetings that he attended; their testimony on this subject appears on 242 pages of the record. The questions put to them by both government and defense counsel explored in depth the business situations which gave rise to the meetings, the objectives of the respective parties, the matters discussed, the things said, the points agreed upon and the extent, if any, to which the terms of the alleged conspiracy were among the subjects discussed or agreed upon. The written agreements which resulted from the meetings were put in evidence and their terms were discussed. Each of these agreements was conceded by government counsel to be lawful on its

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* The Federal Trade Commission Hearing Examiner relied on similar testimony in dismissing all charges of conspiracy and said:

"The witnesses called by respondents, particularly their principal officials, impressed the undersigned as being candid, straightforward, honest and credible."

face (R. 280a); and in important respects they were inconsistent with the existence of the conspiracy alleged.

The treatment of this evidence in the jury instructions was neither fair nor accurate. After charging that the conspiracy allegedly began at certain meetings and that the meetings could have provided the opportunity for conspiracy, the court instructed the jury as to the testimony of the officials in such a way as seriously to misdescribe and undermine this evidence. (The passage in question is the two full paragraphs at App. 108a.) Although language similar to that used by the court might correctly describe testimony in some other case, its use here was highly erroneous.*

This passage described the testimony so inadequately as to be misleading. The witnesses' complete and detailed account of what actually happened at the meetings was characterized as denials of illegal agreements "in broad terms" and as mere "assertions of innocence". This is not at all what the testimony amounted to. The accompanying comments on the testimony, most of which suggested reasons for giving it little weight, did not correct the erroneous description of its content.

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* A similar charge was upheld in *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 39 U.S.L.W. 3376 (March 1, 1971), but as the government's petition (p. 26) recognized, that decision is not in conflict with the court of appeals' decision here. In that case the defendants failed to preserve the issue by objecting to the charge and, in addition, the Third Circuit found the cases "clearly distinguishable" on their facts. 433 F.2d at 201. The evidence of conspiracy there was direct and not circumstantial, as here, and the court of appeals described this evidence as "compelling," while the Second Circuit characterized this as a "close" case (43a).

If it be said that the jury could be counted on to remember that the testimony was more substantial and affirmative than the trial court indicated, it should be borne in mind that the last testimony about the meetings had been completed 37 days before the charge was given to the jury. During the interval the jury had been listening to voluminous evidence about fermentation chemistry, about complex proceedings in the Patent Office, and to extensive closing argument by the government about these matters and about matters relating to production costs, selling prices, etc. Also noteworthy is the fact that the charge concerning the officers' testimony was preceded by a lengthy discussion of the content and significance of the evidence on these other matters with which the jurors had been occupied for so long. As to the officers' testimony, the jury was not helped in reconstructing the scope and content of the evidence but was given a serious understatement of its nature and effect.

A further defect in this portion of the charge was the suggestion by the trial court that the testimony of the officers was somehow inconsistent with earlier statements made by them. The jury was told that "the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter". The testimony of the officers stated in detail what "the defendants did and said at the time". There was not a scrap of evidence, written or oral, to suggest that anybody representing any defendant had made any statement inconsistent with what was asserted to have been said and done at the meetings. The inconsistency suggested by the charge simply did not exist.

This part of the charge may well have been confusing to the jury for the further reason that it brought up the question whether it would be a defense "that the conspirators did not believe they were violating the law or intend to commit such a violation". This would be relevant only if one of the "conspirators" had testified that he did not believe that he was violating the law or intend to commit such a violation. There was no such testimony from any of the witnesses. None of them said anything about his views or intentions as to the legality of his conduct.

Another important objection to this part of the charge was that the jury was given no guidance whatever as to what portions of the testimony the trial court deemed to have reflected "legal" rather than "factual" contentions. The court was expressly addressing itself to whether the jury should "overlook or reject" the testimony. In this context the jury was told that "assertions of innocence by the officers may reflect partly legal as well as factual contentions". It had been made clear to the jury that it must take its law from the court (App. 44a); it was therefore its duty to "overlook or reject" that part of the testimony which consisted of legal contentions. There was nothing in the charge which would give the jury any basis for differentiating between the legal and the factual. The jury was thus in the position of having been told that it might well have to reject some part of the testimony without any guidance as to how this part was to be identified. In these circumstances the easiest course for the jury was to reject it all.

The petitioner's basic answer to the court of appeals' finding of error is reliance on the truism that a finding of "agreement" under the Sherman Act must rest on mixed

questions of fact and law. The decision is in no way contrary to this rule of law.

The court of appeals, we submit, was amply justified in its conclusion that the charge "slighted and rather deprecated" the testimony of the officials (App. 16a).

4. The trial court's emphasis on assertions of patent fraud

In view of the trial court's handling of the evidence which was vital to the defense case, its emphasis on allegations of patent fraud also was likely to mislead the jury. The Patent Office evidence had indirect relevance at best to the basic conspiracy charges, since imposition on the Patent Office was not alleged to be one of the terms of conspiracy and since the government conceded it had no evidence that the defendants had conspired to defraud the Patent Office (R. 4135a). The government's evidence as to alleged patent fraud related to *ex parte* activities of the companies in pursuit of their own patent applications; even if fraud had been proved, an inference of conspiracy would not necessarily follow.

The government was frank to admit that it stressed the evidence to cast a bad light on the defendants. In his summation, government counsel indicated that he would deal with this evidence in some detail "since it reflects upon the personnel involved in some way" and because "anybody guilty of [patent fraud] certainly has a reflection cast upon them" (R. 4883a). The stress on this evidence in the summation and the charge compounded the prejudice caused by the trial court's inadequate and misleading treatment of evidence favorable to the defense.

Upon the whole record, the court of appeals concluded that the charge "virtually diverted" the trial "from an antitrust conspiracy case to a patent fraud case" (App. 18a).

5. The trial court's treatment of the patent licenses to Squibb and Upjohn

A key issue in the case centered around licenses granted by Pfizer to Squibb and Upjohn which permitted those companies to use and sell tetracycline, but did not expressly grant manufacturing rights. Both the majority below and the dissenting judge agreed that these licenses contained "no affirmative restrictions" (App. 28a, 37-38a); and this view is now accepted by the petitioner (Pet. 28). But in his instructions the trial judge mischaracterized these licenses as containing "a restriction forbidding manufacturing by Squibb and Upjohn" (App. 95a) and a "limitation on Squibb and Upjohn, which barred them from manufacturing" (App. 95a). This mischaracterization was relied on by the court of appeals in its reversal and also was recognized by Judge Hays in his dissent:

> "The instruction might have been construed by the jury to mean that but for the restriction Squibb and Upjohn would have had the right to manufacture tetracycline, whereas in fact there would have had to be a specific grant of permission." (App. 37a)

The petitioner, in an attempt to minimize the impact of the mischaracterization upon the jury, argues from another portion of the charge "explaining a patent monopoly" that it "was made clear to the jury" that the licenses "contained

no affirmative restrictions" (Pet. 28).* This contention, however, is at odds with the trial court's own view as expressed during argument on defendants' exceptions to the charge.

> "Mr. Clark: * * * In discussing the licenses that Squibb and Upjohn ultimately got, I believe your Honor told the jury that those licenses precluded or barred Upjohn and Squibb from manufacturing.
>
> "The Court: I said they did contractually preclude or at least I meant to say it.
>
> "Mr. Clark: But we except to that." (R. 5019a)

It cannot now fairly be argued that the jury understood the charge differently than the trial judge himself intended.

The jury had neither the competence nor the superior wisdom to correct or disregard the trial court's legal interpretation of the Squibb and Upjohn licenses as restricting manufacture, an interpretation which, Judges Moore, Friendly and Hays all agree, was erroneous as a matter of law.

It is no answer to so basic an error for the petitioner now to point to other statements in the instructions and contend that they must be presumed to have neutralized whatever harm the error may have caused. Although the jury was instructed that none of the written agreements were unlawful in themselves, this was of little moment so far as the Squibb and Upjohn licenses were concerned in face of the clear path to conviction which the error in the charge provided. As pointed out in the court of appeals opinion:

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* The government took an inconsistent position in its summation to the jury. (R. 4877-78a, 4880-81a)

> "the term 'restriction' was used alternately to characterize the licenses and to describe what Pfizer and Bristol were forbidden to agree on [*]. The net result was that the charge might be read to contain this syllogism: Pfizer and Bristol were forbidden to agree to restrict licenses to others; the licenses given imposed restrictions on Squibb and Upjohn; Pfizer and Bristol agreed on those licenses; therefore, Pfizer and Bristol did what they were forbidden to do." (App. 29a)

In his dissent, Judge Hays, while conceding error in the instruction, states

> "It seems to me to be quite unlikely that the jury was seriously misled by this instruction." (App. 37a)

With deference, we believe it plain that it could not have been other than "serious" for the jury to have been misled here. For the point on which it was so clearly misled was in an area which the instruction itself stressed as "vital" and "critical" to the issue of whether Bristol conspired with Pfizer and Cyanamid (App. 95a).** The court of appeals (without reaching the other basic and prejudicial errors in the instruction on this point, errors also argued on the appeal) rightly refused to presume such error harmless.

6. The trial court's treatment of the evidence as to Bristol's concededly non-conspiratorial conduct

The government asserted that Bristol entered the alleged conspiracy at a specific meeting held over two days, Dec. 14-15, 1955. It asserted that prior to this date "there is

---

* Compare App. 64a, 71-2a, 95a.

** See *Bollenbach* v. *United States*, 326 U.S. 607, 613 (1946).

nothing about the activities of Bristol that we criticize or say are illegal" (R. 4867a). Nevertheless, virtually all of the evidence relating to Bristol concerned its activities prior to this meeting. The court of appeals said that this circumstance called for "the clearest instructions that the jury should not consider Bristol's part in any of the events prior to Dec. 14-15, 1955 as proof of Bristol's being in any conspiracy" (App. 31a). Such instructions were requested (R. 5586-88a), and the trial judge had said that he would include in his charge the substance of this request (R. 4658-59a). Thereafter, contrary to his earlier ruling, the trial judge failed to include the substance of this request in his charge. And he compounded the error by saying to the jury that "it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges" (App. 68a). The trial judge conceded subsequently that this portion of the charge might have a "possibly misleading impact" and the "incidental result of misleading the jury" (R. 5096a, 5097a). But he had refused to correct it.

The government mischaracterizes the holding of the court of appeals in saying that it was inconsistent with the settled principle that evidence of acts prior to the formation of a conspiracy is admissible to establish motive, intent, etc. (Pet. 29). That point is not in issue here. We are not dealing with the admissibility of evidence but with a misleading charge. And the government's only answer to the contention that the charge was indeed misleading is once again to point to other portions of the charge and to statements of counsel in support of the unprovable assertion that despite the misleading instruction, the jury was not on the whole misled (Pet. 29).

CONCLUSION

No questions of law or considerations of public interest make Supreme Court review appropriate at this time. Moreover, the court below was correct in holding that basic errors require a new trial. Accordingly, the petition should be denied.

Respectfully submitted,

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No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA, PETITIONER

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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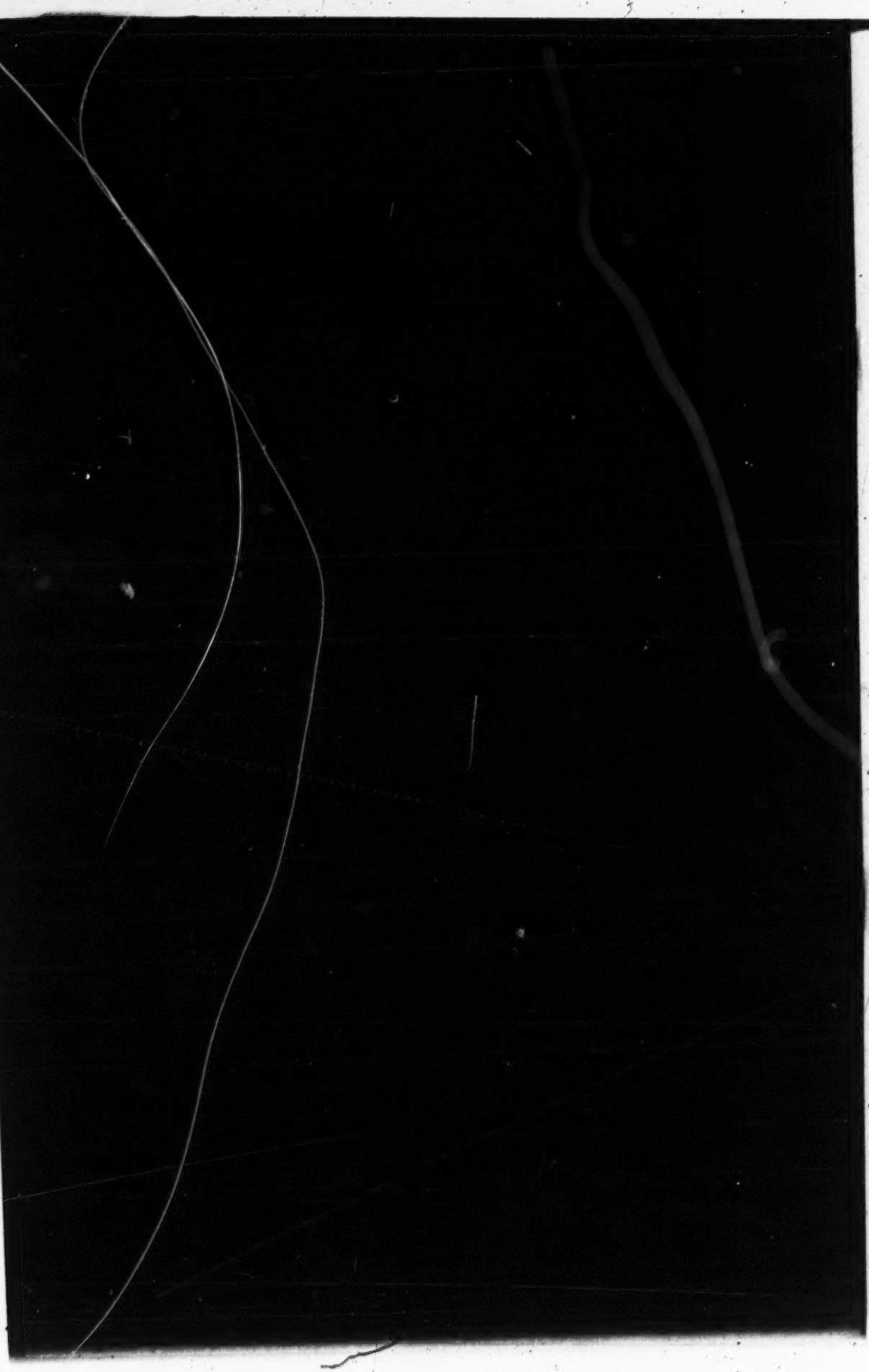

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1. Respondents assert that this case is not of public importance because changes in the structure of the antibiotics industry and settlements they have made of private antitrust suits have dissipated any significance the case may once have had. But the purpose of a criminal prosecution such as this is to punish law violators, in order to deter commercial conduct destructive of the competitive system on which the public depends for protection against economic abuse. Changes in the industry and substantial payments made in settlement of private litigation, although perhaps relevant in determining the need for equitable

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relief in a civil suit, are irrelevant in determining the need for further review of the reversal of convictions in a major criminal antitrust case.

2. Respondents' stress upon the court of appeals' reference to other, undisclosed errors and to the fact that this case is being remanded for retrial only emphasizes the need for review now. The remand for a new trial without indicating what other errors have influenced the appellate court's thinking, leaves the district court without guidance, and risks a needless expenditure of time and energy of the district court, the prosecution and the defendants themselves.

3. We have shown (Pet., pp. 16–21) that the trial court's charge properly treated the evidence pertaining to similarities and differences between the conduct of the defendants and their co-conspirators and of Parke, Davis, which was not named as a conspirator. Respondents make no attempt to answer the point in the petition that defense counsel's failure to discuss at length the similarity between the conduct of Parke, Davis and of their clients resulted not from any limitation imposed by the trial court, but from counsel's own decisions as to the best trial strategy.

The trial court properly refused to give defendants' proposed charge on the role of Parke, Davis because it was one-sided, mentioning the similarities but ignoring the many differences between the conduct of defendants and Parke, Davis (4711a–4712a). Moreover, contrary to their present assertion (Br. in Opp., pp. 16–17), counsel understood that they were free (a) to argue that the government did not claim that Parke, Davis

was in the conspiracy (4647a), and (b) to stress the similarities between the defendants' and Parke, Davis' actions, subject to the government's right to emphasize the differences (4646a).

4. Contrary to respondents' contention (Br. in Opp., p. 18) the trial court did not "exclude" evidence of their costs which might have refuted the government's contention that their prices were unreasonably high. Rather it required that such evidence, proffered as special cost studies, be presented by a qualified witness at an appropriate time, after opportunity for the government to examine the data (see, *e.g.*, 1708a, 1849a, 1989a). That this was clear is shown by the fact that defense counsel expressly admitted their understanding that nothing was being permanently excluded (1687a–1688a). Indeed, special cost studies relating to a co-conspirator, Squibb (Pfizer X 602–605), admission of which had initially been postponed (2238a–2241a), were received in evidence without objection 4426a–4428a). Since respondents had the same opportunity to introduce relevant data, failure to produce their own cost studies reflected a strategic choice, not any exclusionary ruling by the court (see 4564a).

4. Contrary to respondents' assertions (Br. in Opp., p. 22) and the implications in the court of appeals' initial opinion (Pet. App., pp. 16a–17a), the charge to the jury did not characterize all the testimony of defendants' officials as "assertions of innocence" or broad denials of the illegal agreements alleged in the indictment. As the trial judge noted in his post-trial opinion (281 F. Supp. 837, 848), the testimony of defendants' officials was of two kinds: (1) business

explanations for the inter-company agreements and other actions which the government claimed reflected, when taken as a whole, the conspiracy to restrain trade alleged in the indictment; and (2) negative answers to questions, tracking the indictment's allegations, as to whether they had acted illegally (*e.g.*, 2734a–2735a). In order to remind the jury of the testimony setting forth the business explanations, the "instructions contained repeated reminders that the actions taken by the defendants were entirely lawful if taken independently; that the jury was to consider whether the evidence reflected only normal, independent, self-interested, and lawful business conduct, or unlawful conspiratorial action; and that the essential and pervasive question was whether the government's charge of conspiracy had been proved [references omitted]." 281 F. Supp. at 848. The charge stated that "In weighing the significance and meaning of the meetings in this case, you will consider the extent to which you heard legitimate business purposes for them * * *" (Pet. App., p. 107a). But that left the question of how the jury should be guided in appraising the officers' "assertions of innocence." The trial court's separate treatment of this "denial of wrong doing" testimony (Pet. App., p. 108a) was, as we show in the petition, entirely proper. Respondents' argument (Br. in Opp., p. 23) based on the interval between their officials' testimony and the charge overlooks the summations, which furnished defendants a full opportunity—which they used—to summarize for the jury the "explanatory" testimony, as well as the "denials."

5. Respondents stress a portion of the colloquy on exceptions to the charge to support the ruling below (Pet. App., pp. 28a–29a) that the instruction dealing with the licenses Pfizer granted, at Bristol's request, to Upjohn and Squibb (Pet. App., pp. 94a–95a), was prejudicially erroneous insofar as it stated that the licenses themselves barred Squibb and Upjohn from manufacturing, when, in fact, the bar was due to Pfizer's patent. The full text of the colloquy (5019a–5020a) shows, however, that respondents' objection to the charge was on a different ground: the claim that the licenses in fact granted the right to manufacture to Squibb and Upjohn because of a legally implied right to do so if they could not obtain tetracycline from a non-infringing source. They never excepted on the ground relied on by the court of appeals. Thus, defendants did not believe when the charge was given that it might mislead the jury into concluding that the licenses to Squibb and Upjohn, or the Pfizer-Bristol agreement to issue them "impos[ed] restrictions which otherwise did not exist" (Pet. App., pp. 28a–29a).

Because the indictment alleged (¶ 46(i)) that "Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of Tetracycline Products," the court had to explain the significance of this allegation as it bore on the ultimate question of whether there was a conspiracy. Contrary to respondent's contentions, the court's charge on this point (Pet. App., pp. 94a–95a) never stated that the licenses themselves prohibited manufacture. The court had earlier explained the dif-

ference between unilateral and consenual limitations on patent licenses,[1] and stated that "the government does not claim that any of the license agreements involved in this case or indeed any of the written agreements in this case is in itself unlawful or in combination with any of the others, without reference to other facts. Accordingly, you may not infer an antitrust violation merely from the existence of such agreements or from any of the terms contained within them" (Pet. App., p. 71a). The charge explained to the jury, in clear and neutral terms, that the licenses to Squibb and Upjohn were "limited" or "restricted" in the sense used throughout the trial, namely, that they did not include all rights held by the patentee (*i.e.*, they did not grant the right to manufacture.)[2]

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[1] "* * * it is important to remember in this case that a patent confers a lawful monopoly upon the inventor or assignee of the inventor of a useful product. In the absence of a conspiracy with others, the holder of such a patent monopoly may keep and enjoy it for himself, or may license or refuse to license it as he sees fit" (Pet. App., p. 64a).

"The holder of patent rights has * * * a form of lawful monopoly and freedom to exclude others from sharing it. But the patent laws as I have told you, do not authorize him to agree with his licensee that he will exclude or restrict others by refusal or limiting grants under his patent to such other or third parties" (Pet. App., pp. 71a).

[2] For example, Bristol's counsel, referring to the Squibb-Upjohn licenses, asked the jury to "Keep in mind you will hear that referred to as a *limited* license or a *restricted* license. That term is used in the sense that the license was not as broad as it might have been, but the license did not limit Squibb and Upjohn with respect to tetracycline bought from Bristol" (4740a–4741a; emphasis added). Moreover, Bristol itself had written, when it undertook to obtain licenses for Squibb and Upjohn, that they

6. Bristol is alleged to have joined the conspiracy in December 1955. The record refutes respondents' claim (Br. in Opp., p. 29) that the trial judge "conceded" that his charge might have misled the jury into concluding that Bristol could be found guilty for conduct prior to that date. The pertinent portion of the court's explanation for that part of the charge is as follows (5096a–5097a):

> THE COURT: There is something in your papers, Mr. McDonald, and I might as well state my position now on a transcript so that it will be perfectly clear about the possibly misleading impact of that part of the charge, and I think the legislative history of that ought to be perfectly well understood on all sides and on all levels, i.e., at the outset of the trial the defendants raised an issue as to the question of the continuing character of the conspiracy as it related to the problem of the statute of limitations [1298a–1299a], and based upon the opposed submissions that were given at that time, I told the jury at the outset to be on the qui vive for chronology because they were going to have a statute of limitations problem [1469a–1470a].
>
> At the very end of the trial, when we discussed the charge and I pointed out to both

---

"may, however, be *limited* to your right to purchase, use and sell tetracycline to the drug trade * * * GX 83, 8645a; GX 108, 8703a; emphasis added). Bristol's settlement on its behalf and on behalf of Squibb and Upjohn of the infringement litigation between them and Pfizer resulted in the grant of licenses to each of the alleged infringers at the same royalty: Bristol received an unlimited license, including the right of manufacture but the Squibb and Upjohn licenses did not include this right.

sides what it seemed to me appropriate to say about the problem of continuing conspiracies and the burden of affirmatively showing withdrawal once entry has been shown, the defendants, for perfectly understandable reasons, decided that they didn't want to put to the jury any question of the statute of limitations, and so we abbreviated that part of the charge [4628a, 4653a–4655a]. But in that connection I told the jury still that they had to find a conspiracy during a substantial part of the limitations period.

Now, I say all that because I don't think I am going to discuss it in an opinion but I just want you to recall that that particular thing came to pass in that particular way, and it does seem to me on its trivial level to be a meaningful review of how we got to be where we were, and I don't know whether it had the incidental result of misleading the jury—I hope it did not—but now I relieve myself of that thought for the day.

CONCLUSION

For the reasons stated in the petition and this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Wright, *Federal Practice and Procedure, Criminal* 91

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70–72

UNITED STATES OF AMERICA, PETITIONER

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (12585a–12615a) are reported at 426 F. 2d 32; the opinion denying rehearing and the order of the court denying rehearing *en banc* (12617a–12619a) are reported at 437 F. 2d 957. The opinion of the district court denying defendants' motions for judgments of acquittal notwithstanding the verdict, or for a new trial (6446a–6473a) is reported at 281 F. Supp. 837.[1]

[1] Pre-trial opinions in this case are reported at: 205 F. Supp. 94 (denial of defense motions to stay the prosecution pending completion of related Federal Trade Commission proceedings);

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1970 (12616a). On December 1, 1970, the court denied the government's timely petition for rehearing and rehearing *en banc*. On December 21, 1970, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari to and including January 30, 1971. The petition was filed on January 29, 1971, and was granted on May 3, 1971 (402 U.S. 942; 12620a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in reversing criminal convictions by a jury in a major and complex antitrust conspiracy case because of alleged errors in the instructions, the court of appeals applied an improper standard of review by considering particular language in isolation rather than evaluating the charge in its entirety in the light of all the evidence and the defendants' arguments to the jury.

2. Whether the trial judge:

(a) unduly stressed an inflammatory issue when he told the jury that it may consider defendants' high

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217 F. Supp. 199 (denial of defense motions to strike allegations of unreasonably high profits and prices from the indictment and to dismiss the monopolization count); 245 F. Supp. 801 (granting motions of the individual defendants to dismiss the indictment as to them on the ground that they were immune from prosecution); 1967 Trade Cas. ¶72,170 (denial of defense motions to dismiss the indictment for prejudicial delay in impaneling the grand jury which returned it and for discovery of the Justice Department's internal memoranda which bore on the alleged delay).

profits and uniformly high prices along with other evidence bearing on the charge of conspiracy;

(b) should have charged that before the jury can convict it must find false the denials of illegal agreement by defendants' officials;

(c) properly (i) permitted both sides to argue to the jury the significance of the conduct of an unindicted firm in the industry while barring defendants from discussing that firm's presumption of innocence, and (ii) charged the jury that it may consider the conduct of the unindicted firm but is to draw no inferences from the fact that it was not indicted;

(d) in his charge unduly emphasized the patent aspects of the case, inaccurately described patent license arrangements among defendants and co-conspirators and improperly explained the significance of preconspiracy conduct by one of the defendants.

STATUTE INVOLVED

Sections 1 and 2 of the Sherman Act (26 Stat. 209; as amended, 15 U.S.C. 1 and 2) provide in pertinent part:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one

year, or by both said punishments, in the discretion of the court.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT

In this criminal antitrust case, after a lengthy trial presided over by Judge Frankel of the United States District Court for the Southern District of New York, a jury convicted three corporations, Chas. Pfizer & Co., Inc. ("Pfizer"), American Cyanamid Company ("Cyanamid") and Bristol-Myers Company ("Bristol") under a three-count indictment charging the defendants with violating Sections 1 and 2 of the Sherman Act. The violations were: (1) conspiring to restrain, (2) conspiring to monopolize, and (3) monopolizing trade in a market which consisted of four clinically interchangeable broad-spectrum antibiotic drugs: tetracycline, chlortetracycline (Aueromycin), oxytetracycline (Terramycin) and chloramphenicol (Chloromycetin). Each defendant was fined the maximum of $50,000 on each count.

A divided panel of the Court of Appeals for the Second Circuit reversed and remanded for a new trial, primarily because of what the panel considered to be

errors in the instructions to the jury (12585a–12615a; 426 F. 2d 32). The full court initially granted the government's petition for a rehearing *en banc*, but vacated its order, 4–3, after the panel rendered a second opinion denying rehearing but materially modifying the reasons for its earlier ruling (12617a–12619a; 437 F. 2d 957).

THE INDICTMENT

The indictment (24a–41a) was returned on August 17, 1961, naming as defendants Pfizer, Cyanamid and Bristol,[2] and as co-conspirators Olin Mathieson Chemical Corporation (which subsequently acquired and is referred to as "Squibb") and The Upjohn Company ("Upjohn"). It charged (32a–33a) that the defendants and co-conspirators engaged in a continuing "unlawful combination and conspiracy which began in or about November 1953" to restrain trade in the broad spectrum antibiotic market. It alleged that the terms of the "continuing agreement and concert of action among [the] defendants and co-conspirators" were that:

(a) The manufacture of tetracycline be confined to Pfizer, Cyanamid and Bristol.

(b) The sale of tetracycline products be confined to Pfizer, Cyanamid, Bristol, Upjohn and Squibb.

(c) The sale of bulk tetracycline be confined to

[2] The principal official of each defendant company also was indicted, but the charges against these individuals were dismissed on the ground that they had acquired immunity by testifying before a grand jury. *United States* v. *Chas. Pfizer & Co.*, 245 F. Supp. 801 (S.D.N.Y.).

Bristol and bulk tetracycline be sold by Bristol only to Upjohn and Squibb.

(d) The sale of broad spectrum antibiotic products by the defendant companies and the co-conspirator companies be at substantially identical and non-competitive prices.

Count One of the indictment charged a conspiracy to exclude competitors from, and to fix or maintain prices in, the broad spectrum antibiotic market, in violation of Section 1 of the Sherman Act. The indictment listed twelve "means and methods" by which the conspiracy was effectuated. These alleged, in summary, that Pfizer and Cyanamid had licensed each other and Bristol to make tetracycline under their respective tetracycline and Aureomycin patents but refused to license all other applicants; that Cyanamid cooperated with Pfizer and assisted it in obtaining a patent on tetracycline; that Cyanamid and Pfizer withheld material information from the Patent Office and otherwise misled it; that Pfizer, Cyanamid and Bristol suppressed litigation involving the validity of Pfizer's tetracycline patent; that except for a bulk sale of tetracycline by Cyanamid to Pfizer in 1954 to assist it in promptly entering the tetracycline market, only Bristol was permitted to sell bulk tetracycline, and only to Squibb and Upjohn, who agreed to buy all their requirements from Bristol; that Pfizer issued licenses to Squibb and Upjohn limited, at Bristol's request, to the sale and not manufacture of tetracycline products; and that the defendants and co-conspirators maintained substantially identical and unreasonably

high prices on their brands of broad spectrum products, and substantially identical customer classifications and dosage forms from November 1953 to at least July 1960 (33a–35a).

Count Two charged that the defendants and co-conspirators had conspired to monopolize the broad spectrum antibiotic market in violation of Section 2 of the Sherman Act, by agreeing to the terms of the conspiracy alleged in Count One (37a–38a).

Count Three charged that the defendants and co-conspirators had succeeded in monopolizing the broad spectrum antibiotic market in violation of Section 2 of the Sherman Act from November 1953 to at least August 1961 (39a–40a).

THE FACTS

BACKGROUND OF THE CONSPIRACY—PRIOR PRICE COMPETITION

Broad spectrum antibiotics (*i.e.*, antibiotics which are effective against a wide range of bacterial infections) were first marketed in 1948 when Cyanamid began selling chlortetracycline under its brand name Aureomycin. In September 1949 it received a patent on Aureomycin and certain processes for producing it (GX 1, 7353a–7357a). In January 1949, Parke, Davis & Company ("Parke, Davis")[1] began marketing chloramphenicol under its brand name Chloromycetin, and in October 1949 received a patent. In March 1950 Pfizer began marketing oxytetracycline under its brand name Terramycin; in July 1950 it

[1] Parke, Davis was not named as a defendant or co-conspirator.

received a patent (GX 918, 10300a–10308a; Ct. X 4, pp. 2–3, 6692a–6693a).

As each new product was introduced, there was active price competition. Cyanamid introduced Aureomycin at a price to druggists of $15 for a bottle of sixteen 250 mg. capsules.[4] Parke, Davis introduced Chloromycetin at $9.99, after which Cyanamid reduced its Aureomycin price to $10.00. Cyanamid and Parke, Davis both reduced their prices to $8.00 in February 1950. In March 1950 Pfizer introduced Terramycin at $8.40. In May 1950 Parke, Davis reduced its price to $6.00, and Cyanamid and Pfizer followed the reduction. In September 1951 Pfizer reduced its price to $5.10 and the other two companies followed (see 2745a–2748a). From October 1951 through July 1960 the prices for broad spectrum antibiotics remained substantially identical and unchanged. This remained the situation despite the marketing, beginning in 1953, of the newest and most important antibiotic, tetracycline, first by Cyanamid and Pfizer, and then also by Bristol, Squibb and Upjohn.

IMPORTANCE OF THE BROAD SPECTRUM ANTIBIOTIC MARKET TO CYANAMID AND PFIZER

Broad spectrum antibiotics were highly important and profitable items for Cyanamid and Pfizer even before the general introduction of tetracycline and despite the price competition that had occurred. In 1953 the total broad spectrum market (excluding

[4] Prices to retail druggists are referred to by the trade as "retail prices." Dates and prices are those shown in Ct. X 4, App. B, pp. 33, 67, 147, 6723a, 6757a, 6837a.

veterinary and foreign sales) amounted to approximately $78 million. Pfizer had almost half the market with Terramycin sales of more than $36.5 million, 29 percent of its sales of all products. Cyanamid had a nearly equal share with Aureomycin sales of $32 million. Parke, Davis had the remainder (GX 909, 10287a; GX879, 10248a). These drugs returned substantial profits. The record does not show Cyanamid's 1953 profits, but in 1952 its pre-tax profit on Aureomycin sales was $28.9 million. Pre-tax profit for Cyanamid's entire Lederle Division (including Aureomycin) were only $22.4 million, indicating the rest of the Division lost more than $6 million that year (GX 852; p. 4, 9866a; GX 879, 10248a).[5]

The only other broad spectrum antibiotic available prior to 1953, Parke, Davis' Chloromycetin, had received adverse medical reports in 1952 (3307a–3308a, 3350a). As a result Parke, Davis' sales (and market share) dropped from $22.5 million (22.5 percent of the market) in 1952 to $6.2 million (7.9 percent of the market) in 1953 (GX 909, 10287a).

TETRACYCLINE—ASSURANCE OR DISRUPTION OF THE MARKET

The advent of tetracycline, which was expected to compete well against Aureomycin and Terramycin, could either assure or disrupt Pfizer and Cyanamid's position in the broad spectrum antibiotic market (2749a–2750a, 2431a, 2461a, 2559a, 2760a, 3595a).

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[5] These figures are based on net sales of $59.1 million, about 35 percent of which are attributable to foreign and veterinary markets. Pfizer's profits on broad spectrum antibiotics for the pre-tetracycline years were not available. For Pfizer's profits several years later see p. 47 *infra*.

Tetracycline was the subject of several patent applications. Pfizer discovered its molecular structure in June 1952 and filed the first patent application for it in October 1952 (2446a; GX 6, 7535a–7542a). Cyanamid filed its patent application in March 1953 (GX 5, 7457a–7483a). The Heyden Chemical Corp., whose Antibiotic Division Cyanamid acquired in November 1953 (Ct. X 4, pp. 4–5, 6694a–6695a), filed an application in September 1953 (GX 8, 7567a–7618a). Bristol filed an application on tetracycline in October 1953 (GX 9, 7682a–7710a).

As Cyanamid's patent attorney explained at trial with reference to the competition there had been in penicillin, "* * * with no patents on tetracycline, you could imagine the same thing would happen, and not only if the price of tetracycline went down, it would take with it the price of Aureomycin * * *" (3686a). By November 1953, when the efforts to control the market began, Cyanamid had de-emphasized Aureomycin (2761a–2762a) and was irreversibly committed to tetracycline (2770a–2771a).

THE INITIAL PFIZER-CYANAMID AGREEMENTS

The patent applications that Pfizer and Cyanamid had pending in 1953 both relied upon the deschlorination of chlortetracycline (Aureomycin), on which Cyanamid held both product and process patents (2295a, 2254a, 2765a). Pfizer thought that its application probably would prevail over Cyanamid's (2319a, 2459a, 2559a). But Pfizer also knew that even if it obtained a patent it could not manufacture tetra-

cycline by deschlorination without obtaining from Cyanamid either a license to make Aureomycin or sufficient quantities of Aureomycin from which to manufacture tetracycline (2364a, 2560a). Cyanamid believed that it could prevent anyone else from manufacturing tetracycline by virtue of its Aureomycin patents (2768a, 2711a, 2783a, 2811a). Thus each thought itself blocked by the other.

In early November 1953, McKeen, the chief executive officer of Pfizer, called on Malcolm, the chief executive officer of Cyanamid's Lederle Laboratories, for the purpose of settling their tetracycline problems (2449a–2451a, 2767a–2768a). No agreement was then reached, but a subsequent meeting was scheduled for the following week (2452a). At the second meeting, McKeen and Powers, a Pfizer vice-president, called on Malcolm and Martin, the latter a Cyanamid vice-president (2282a–2286a, 2391a–2394a, 2452a–2453a, 2772a). At this meeting agreements as to tetracycline were reached. The agreements at that point were entirely oral. They went at least this far:

Pfizer and Cyanamid agreed to exchange proof of priority. The "loser" would concede priority in the Patent Office, and the "winner" would license the "loser" under its tetracycline patent at a 2½ percent royalty rate. Cyanamid would license Pfizer to make Aureomycin for the manufacture of tetracycline at a royalty of 2½ percent of the net sales value of the tetracycline sold by Pfizer, and would make available its know-how for the manufacture of Aureomycin, as well as its most efficient Aureomycin-producing cul-

ture. Pfizer would give Cynamid its know-how on the deschlorination of Aureomycin. Finally, Cyanamid would sell to Pfizer a large quantity of bulk tetracycline to permit Pfizer's early entry into the tetracycline market. The agreements, other than that relating to the sale of bulk tetracycline, were to become effective as soon as the Patent Office officially declared the interference on tetracycline (2302a–2304a, 2294a–2397a, 2454a–2458a, 2772a–2774a).

The government contended in the trial court and contends here that it was also understood between Pfizer and Cyanamid that neither would allow other companies into the market and that they would not compete with one another with respect to price.

IMPLEMENTATION OF THE PFIZER-CYANAMID AGREEMENTS

On December 23, 1953, the Patent Office officially notified Pfizer (GX 4, pp. 24–25, 7394a–7395a) and Cyanamid (GX 5, pp. 58–59, 7515–7516a) of the interference between their respective tetracycline applications. On January 11, 1954, the settlement agreement (GX 54, 8542a–8560a) and the Aureomycin license agreement (GX 53, 8527a–8541a) were signed. Without waiting for the formal settlement, between November 25, 1953, and March 31, 1954, Cyanamid sold to Pfizer 10,000 kilograms of bulk tetracycline at an average price of $387.50 per kilogram (Ct. X 4, p. 5, 6695a), a total sales price of $3,875,000. Pfizer was thus able with the help of Cyanamid to commence marketing tetracycline products under its trade name Tetracyn in January 1954 (Ct. X 4, p. 3, 6693a).

Though Pfizer and Cyanamid denied that they had in mind a particular resale price, the bulk price was approximately one-third the resale value of the product and the government alleges that the price reflected the drug industry's rule of thumb that the gross return of a product should be three times its factory costs (2285a–2296a, 2473a–2477a, GX 914–917, 10292a–10297a; 2900a).

After the signing of the formal agreements between Pfizer and Cyanamid, patent attorneys for the parties met to exchange information on priority. Shortly thereafter, they agreed that Pfizer had priority of invention (3782a–3789a, GX 465, 8921a–8922a). Cyanamid filed a concession of priority on its application in the Patent Office on February 2, 1954 (GX 7, pp. 6–7, 7561a–7562a).

In late January 1954 Pfizer justifiably believed that it would soon receive a patent on tetracycline (2315a), under which Cyanamid and only Cyanamid would be licensed. The government does not contend that it was illegal for Pfizer and Cyanamid to settle their patent dispute, but does contend that the settlement forms part of a pattern evidencing an understanding that the companies would not compete as to price and would combine efforts to prevent others from entering the market.

PFIZER'S NO LICENSE POLICY

Pfizer quickly publicly announced that it would use its tetracycline patent, when issued, to exclude all competitors, except Cyanamid, from the tetracycline market. At a meeting of security analysts held at Pfizer's plant on January 29, 1954, McKeen of Pfizer

announced that Pfizer's policy was not to grant licenses, except to Cyanamid, for the manufacture of tetracycline (2319a–2327a, 2484a–2485a). Pfizer understood that the remarks, which were meant to be relied on, would be "broadcast" (2326a–2327a). The meeting was reported in a "Drug Trade News" article, published on February 15, 1954, which quoted McKeen that Pfizer would object to the entry into the tetracycline field by firms not then in the field (GX 458, 8916a–8917a).

BRISTOL'S PATENT INTERFERENCE

Bristol's patent application for tetracycline had been rejected in December 1953 (GX 9, pp. 30–33, 7713a–7716a), but it filed a continuation application on a salt form of tetracycline (tetracycline hydrochloride) on January 15, 1954 (GX 10, pp. 1–29, 7887a–7916a). At the time, Pfizer attached little importance to Bristol's tetracycline application (2316a) and expected that its own tetracycline patent would be issued shortly (2315a). However, on March 1, 1954, the Patent Office declared an interference among the Pfizer, Cyanamid and Bristol applications on tetracycline hydrochloride (GX 12, pp. 1–2, 8094a–8095a).

The motive for cooperation between Pfizer and Cyanamid in limiting entry into the broad spectrum antibiotic market is shown in the record in the second interference proceeding.

Bristol expressed surprise that Cyanamid had joined Pfizer in opposing Bristol's application for a postponement and was thus seeking an early resolution

of the interference, since Cyanamid would be obligated to pay substantial royalties to Pfizer when a patent issued to Pfizer (GX 12, pp. 100, 8172a). Cyanamid explained why it favored the prompt issuance of a tetracycline patent to Pfizer (GX 12, pp. 114–115, 8186a–8187a, emphasis added):

> * * * Bristol Laboratories * * * commenced the manufacture and sale of tetracycline and are now offering it at reduced prices in the United States and in a substantial number of foreign countries. Cyanamid does not know how much tetracycline is being sold by Bristol, but it is evident that every dollar taken in by Bristol from their sales of tetracycline *is a dollar lost to Cyanamid or Pfizer.* * * *
>
> Worst of all, as the interference is delayed, the Bristol production and sales will undoubtedly increase in volume, and the selling price on the product will be lowered so that at the termination of the interference the profits which would normally accrue to *Cyanamid or Pfizer* from which research funds come, will have been reduced to nothing. * * *

At trial, Cyanamid's patent attorney at the time of the *Bristol* interference was reminded of a statement he has made in a brief in that proceeding (GX 12, p. 370, 8260a)), that prompt issuance of a patent to Pfizer, Cyanamid's ostensible competitor, would be "to the mutual advantage of the parties and to the public," and was asked what advantage there would have been to Cyanamid (3700a). The attorney (Edelblute) replied (*id.*) that

> We wouldn't have people like Bristol in the market for one, we wouldn't have the Italians importing it over here for another, and, of course, anybody—with no patent on tetracycline, any Tom, Dick and Harry with a little bit of money could get in the business.

THE INITIAL REJECTION AND SUBSEQUENT GRANT OF THE TETRACYCLINE PATENT

On October 14, 1954 the Patent Examiner rendered his decision on all the motions in the second interference (GX 12, pp. 431–449, 8281a–8299a). He dissolved the interference as to all parties on his own motion, ruling that tetracycline was not patentable because production of Aureomycin inherently produced tetracycline. The examiner stated that although the inventors for whose work the Aureomycin patents were granted may not have realized that tetracycline was inherently produced with Aureomycin, the identification of tetracycline was not inventive, tetracycline being merely a purer form of an old product (GX 12, pp. 443–444, 8293a–8204a). The effect that this ruling would have had on Pfizer and Cyanamid would have been that the tetracycline market, rather than being restricted to Pfizer and Cyanamid, could have become subject to unlimited entry.

On November 24, 1954, the Examiner officially rejected Pfizer's tetracycline product claims. (GX 4, pp. 31–32, 7401a–7402a).

Despite the existence of co-production, Cyanamid's patent attorney had told the Examiner in December 1953 that Cyanamid "can unequivocally state that there has not been any tetracycline produced

by them, inadvertently or otherwise, in their operations" *i.e.*, in the production of Aureomycin (GX 5, p. 47, 7504a). He repeated during the second interference in 1954 that tetracycline was not inherently produced with Aureomycin (GX 12, p. 36, 8129a; pp. 381–383, 8271a–8273a). He did not verify these statements with Cyanamid's research staff (3704a–3708a), which had known of tetracycline's presence in Aureomycin since December 1953 (GX 58, 8577a; GX 74, 8631a), and in February 1954 had recorded this fact in a memorandum marked as having been sent to Cyanamid's patent attorney (GX 74A, 8632a).

After the dissolution of the second interference, Pfizer sought to overcome the Examiner's "speculation" of inherent co-production (GX 4, pp. 33–40, 7403a–7410a). It relied heavily on Cyanamid's production of "tons of chlortetracycline" and the representations of Cyanamid's counsel that no tetracycline had ever been co-produced. (GX 4, pp. 35–36, 7405a–7406a). Pfizer also presented affidavits describing experiments it had conducted in which recoverable quantities of tetracycline were not produced using Cyanamid's Aureomycin production process (GX 4, pp. 36–39, 7406a–7409a). Pfizer, however, did not inform the Examiner that it had used two of the lowest potency Aureomycin examples available which also had not produced usable quantities of Aureomycin, nor did Pfizer inform the patent office that its scientists had previously performed experiments which showed the presence of tetracycline in fermentation liquors used for producing Aureomycin (GX 40, 42, 43, 8436a–8437a,

8439a–8441a, 8442a–8444a; GX 907, pp. 3–4, 10282a–10283a; 4013a–4018a, 4022a–4023a). At the trial Bristol's patent representative testified that "this co-production had been common knowledge since late in 1953" (4207a, and see 4166a–4167a).

Pfizer's affidavits persuaded the Examiner to abandon the basis of his rejection of the tetracycline product claims.[6] On December 9, 1954, the Patent Office mailed Pfizer a Notice of Allowance of those claims (GX 4, pp. 63–64, 7433a–7434a). The patent issued officially on January 11, 1955 (GX 3, 7365a–7368a).

BRISTOL ENTERS THE MARKET—WITH SQUIBB AND UPJOHN AS CUSTOMERS

In 1953 the financial condition of Bristol Laboratories was "shaky" (2875a). The advent of tetracycline presented Bristol with an opportunity to enter the highly successful broad spectrum antibiotic market (2874a–2875a, 3004a–3005a, 3011a).

Bristol, not wishing to rely solely on its patent claims, tried in the fall of 1953 to arrange a cross-licensing agreement with Cyanamid whereby the winner of the tetracycline patent would license the loser. Cyanamid flatly refused (2779a–2781a, 2876a–2878a, 3009a). After learning of Cyanamid's concession of priority to Pfizer, Bristol asked Pfizer whether Pfizer would use its patent, if granted, to keep Bristol from

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[6] The Examiner testified that, in his view, "any identifiable amount of tetracycline present in this production of Aureomycin would have prevented issuance of a patent to tetracycline" (4400a). On misrepresentation before the patent examiner see *Chas. Pfizer & Co.* v. *Federal Trade Commission*, 401 F. 2d 574 (C.A. 6), certiorari denied, 394 U.S. 920.

entering the tetracycline market. Pfizer stated that it would (GX 48, 127, 8475a, 8726a).

Bristol, none-the-less, began marketing tetracycline products under its own label in May 1954. Since Bristol's sales force was small, it decided to sell bulk tetracycline to two other drug companies (1817a–1818a, 2894a, 3012a–3016a). Squibb agreed to become a customer (2893a). Parke, Davis was Bristol's second choice, but it turned down Bristol's offer in September 1954 (2894a–2895a, 3317a–3318a). Bristol then approached Upjohn, which had the largest organization for calling upon doctors and druggists (3182a), and Upjohn accepted Bristol's offer to become a bulk customer (2895a–2896a).

In September 1954, Bristol began selling bulk tetracycline to Squibb and Upjohn. Squibb and Upjohn were eager to enter the market and initially agreed to purchase from Bristol and to indemnify Bristol for any patent infringement damages it might suffer (2896a–2899a, 3162a–3164a; GX 424, 8901a–8911a). They were not contractually bound to continue to purchase only from Bristol but no one else was offering bulk tetracycline. In the summer of 1955 Bristol lowered its bulk price to Squibb and Upjohn to a level permitting them to earn at the established price the usual gross return of three times factory costs (2900a, 3178a–3179a; GX 405, 8821a–8823a).

The continued existence of Bristol Laboratories depended upon its ability to sell bulk tetracycline to Upjohn and Squibb (2903a, 3148a). When Pfizer was granted the tetracycline patent, the same day it filed

infringement suits against Bristol, Squibb and Upjohn.[7] In answer to Pfizer's complaints against them and in reply to Pfizer's counterclaims, Bristol, Squibb and Upjohn each alleged the invalidity of Pfizer's tetracycline patent on a number of grounds, including lack of invention and misleading the Patent Office (GX 22, 23, 24, 28, 29, 30, 8399a–8405a, 8412a–8420a). In January 1955, soon after Pfizer filed suit, Upjohn's General Counsel wrote to Gilmore, Upjohn's chief executive officer, expressing the hope that in any settlement that might be reached Upjohn would receive a "license without limitations", that is, a license "to make and sell"; but he also recognized that Bristol might seek for itself a license to "make and sell" and obtain only a license to sell for Upjohn as a means of tying Upjohn to Bristol (3190a, 3199a). Gilmore testified at trial that Upjohn wanted as broad coverage as possible including, specifically, the right to manufacture tetracycline (3192a, 3205a–3206a).

Gilmore had two discussions with McKeen of Pfizer in early October 1955, at which he told McKeen that Upjohn would like to settle and take a tetracycline license from Pfizer "to make, use and sell or have made for" Upjohn. Pfizer made no commitment and indicated that Pfizer was not then inclined to discuss settlement (2508a–2513a, 3201a–3217a; GX 423, 8877a–8884a).

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[7] Pfizer's suits were filed on January 11, 1955, alleging infringement of its tetracycline patent (GX 15, 16, 17, 8383a–8388a). Squibb, Upjohn and Bristol then filed actions against Pfizer seeking declaratory judgments that they were not infringing Pfizer's patent (GX 18, 19, 20, 8389a–8395a); Pfizer

Upjohn reported this conversation to Bristol, which quickly sought to negotiate an arrangement with Upjohn that would secure Upjohn as a bulk customer (3224a, 2903a–2905a). An agreement with Upjohn (GX 108, 8698a–8705) was signed on November 3, 1955. Among other things, the agreement required Upjohn to purchase its entire tetracycline requirements from Bristol for the duration of the Pfizer litigation plus three years,[8] and gave Bristol "entire control" of the Pfizer litigation and settlement, with the understanding that any license Bristol secured for Upjohn "may, however, *be limited* to your [Upjohn's] right to purchase, use and sell tetracycline to the drug trade * * *." Bristol also assumed liability for possible infringement by Upjohn.

Bristol signed an identical agreement with Squibb on November 18, 1955 (GX 83, 8639a–8647a).

The effect of this arrangement, if Pfizer concurred, was to enable Bristol to settle the Pfizer litigation for itself, Upjohn and Squibb under terms which insured that Upjohn and Squibb could not themselves manufacture tetracycline and would have to purchase it from Bristol. It also had the effect of halting any fur-

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counterclaimed for damages of $15,000,000 against Bristol (GX 25, 8406a–8407a), $30,000,000 against Upjohn (GX 26, 8408a–8409a), and $6,000,000 against Squibb (GX 27, 8410a–8411a).

[8] This all-requirements provision, which was scheduled to expire on March 28, 1959 (the Pfizer litigation was settled March 28, 1956), was subsequently renewed for annual periods up to March 28, 1962, for Upjohn (GX 671, 672, 673, 8974a–8978a) and to March 28, 1961, for Squibb (GX 688, 689, 8979a–8982a).

ther attempts by Upjohn and Squibb to negotiate or settle with Pfizer independently.

PFIZER, BRISTOL, SQUIBB AND UPJOHN REACH AN AGREEMENT

The settlement of the Pfizer patent litigation was precipitated by what was known as the Broady incident (2633a). Broady, a private detective, was tried and convicted in New York for illegally tapping the telephones of Bristol and Squibb. At his trial, it was revealed that Broady had been retained by Pfizer's general counsel, although no evidence was introduced that implicated Pfizer in the specific wire tapping. After Bristol learned this, it directed its patent attorney to tell Pfizer's patent attorney that Bristol would use the Broady incident in the patent litigation and would file a counterclaim based on that incident. On December 14, 1955, the day after Pfizer's patent counsel was so notified, he and McKeen, Pfizer's chief executive, went to the offices of Bristol's patent attorney to negotiate a settlement (2515a–2517a, 2889a–2890a, 3135a–3137a).

As a result of the meeting, Pfizer and Bristol signed a letter of intent on December 15, 1955 (GX 95, 8678a–8681a) and on March 28, 1966, Pfizer and Bristol signed formal agreements that terminated the litigation upon the following terms:

> (1) Pfizer licensed Bristol to manufacture, use and sell tetracycline at a royalty of 3½ percent of the net sales price of tetracycline products sold by Bristol and its "presently existing bulk customers" (GX 50, 8480a–8500a) which Pfizer knew were Upjohn and Squibb (2534a–2536a).

(2) Upjohn and Squibb received licenses to "purchase, compound and use" tetracycline and "to sell the same in the form of Therapeutic Tetracycline to the Drug Trade," also at the same 3½ percent royalty (GX 51, 52, 8501a–8513a, 8514a–8526a).[9] They could not manufacture or sell in bulk.

(3) The licenses provided that the licensees would not contest the validity of Pfizer's tetracycline patents nor voluntarily assist others in any infringement of the patents (GX 50, Art. VIII, 8496a–8497a; GX 51, Art. VII, 8509a–8510a; GX 52, Art. VII, 8522a–8523a).

A formal settlement agreement, executed simultaneously with the license agreements, provided that all the pending lawsuits would be dismissed without prejudice, and released the parties from any further claims based on the tetracycline patent (GX 86, 8652a–8656a).

PRICING PRACTICES

Total broad spectrum antibiotic sales from 1954 to 1961 were more than $1.1 billion, of which the defendants and co-conspirators accounted for approximately $855 million.[10]

From October 1951 through July 1960 published prices on broad spectrum antibiotic drugs to retailers, wholesalers and private hospitals, by far the most im-

[9] Not more than one royalty to Pfizer was to be payable per unit of tetracycline (GX 50, 51, 52).

[10] GX 875, 10244a. Parke, Davis sold the rest.

portant segment of the market,[11] remained substantially identical and unchanged [12] (see GX 920–927, 930, 10310a–10318a, 10324a). The price schedules used by the defendants and co-conspirators through July 1960 were based on suggested prices to consumers from which set discounts were taken to derive the prices to be charged the various classes of customers (see 1745a–1746a, 2482a–2484a, 3272a–3273a). For example, for the largest selling product form—bottles of 100 capsules of 250 milligrams each—the prices in effect for all the drugs and all the companies from October 1951 through July 1960 were:

List price	$51.00
Retail (druggists and private hospital)	30.60
Wholesale [13]	24.22

In addition to the substantially identical catalogue prices, the defendants and co-conspirators gave no quantity discounts on broad spectrum antibiotics, as they did on other drugs (1862a–1863a, 2538a–2540a, 2995a).

This price identity was in contrast to the prior history of price reduction in the broad spectrum antibiotic market as new products were introduced (2746a–

[11] Tetracycline sales to retailers and wholesalers constituted approximately 77 percent and sales to private hospitals were an additional 11 percent of total tetracycline product sales from 1954 through 1961 (GX 885, 10255a–10256a).

[12] A sample of the invoices of defendants and the co-conspirators showed that virtually all sales to retailers and wholesalers were invoiced at the published prices (Ct. X 10, pps. 2–3, 6938a–6939a).

[13] Upjohn did not sell to wholesalers. Squibb's price to wholesalers was $25.70 and Pfizer's wholesale price for Terramycin was $24.48 (GX 930, 10324a).

2748a; *supra* 8), and in contrast to the price competition in penicillin (3686a). As each company, except Parke, Davis, introduced tetracycyline and as it became more and more important (GX 876, 10245a) there was no fluctuation in the price either of tetracycline or the other broad spectrum antibiotics. Tetracycline captured almost half of the broad spectrum antibiotic market within a year of its introduction (*ibid.*) without a change in price of either tetracycline or the other products.

The prices remained unchanged although sales of tetracycline products first increased rapidly and then declined. From 1954 thru 1960, sales of all tetracycline products varied as follows:

1954	$39,593,000
1955	65,202,000
1956	73,277,000
1957	114,362,000
1958	98,349,000
1959	96,699,000
1960	[14] 81,382,000

During these years of shifting sales volume and identical prices there were significant changes in the market shares of the defendants and co-conspirators. For example, Upjohn (a high cost producer, see page 26, *infra*) increased its sales of tetracycline products from a low of 10.9 percent of the market in 1956 to 11.6 percent in 1957, 15.3 percent in 1958, 19.6 percent in 1959 and 22.2 percent in 1960.[15] Pfizer, a low cost producer, after having reached a peak of 21.6 percent of total tetracycline sales in 1958, declined to

[14] GX 876, 10245a.

[15] *Ibid.*

16.8 percent in 1959 and 15 percent in 1960 without a change in price (GX 876, 10245a).

The failure of the companies to respond to significant changes in demand and market share is not explainable by identical costs that in some industries lead to identical pricing. The production costs did not remain stable but steadily declined.[16] Further, the different companies' costs were not identical. The records kept by the companies in the regular course of business showed that production costs for the standard unit of 100 capsules of 250 milligrams each declined overall from $2.26 to $1.52 for Cyanamid, from $3.87 to $1.70 for Pfizer, and from $6.24 to $1.67 for Bristol. Squibb's and Upjohn's production costs for the same period declined from approximately $13.00 to $7.71 (GX 934, 10325a).

Nor did slim profit margins prohibit price competition. Mr. Schwartz, the chief executive of Bristol, testified that "[t]here is a sort of old rule of thumb in the pharmaceutical business that you need four times your * * * factory cost and that gives you enough money for research, to promote, hire salesmen, take care of general overhead, depreciation and all those things. But that below three for one, * * * you cannot find enough funds to promote effectively and research

[16] GX 934, 10325a, a compilation of production costs made from records the companies kept in the regular course of business. Cyanamid: GX 844, 845, 9279a–9395a; Pfizer: GX 841, 9176a–9268a, 1954a–1955a; Bristol: GX 837, 9051a–9138a, 1685a; Squibb: GX 867, 868, 10191a–10206a, 2221a; Upjohn: GX 863, 10087a–10118a, 1865a.

effectively * * *" (2900a). Mr. Gilmore of Upjohn also spoke of the 3 to 1 rule (3173a–3176a, see also GX 424, 8889a–8911a). Upjohn and Squibb, both large and long established drug manufacturers, were willing to invest large sums in tetracycline in order to make their "normal" profits (2899a–2901a; 3172a–3180a). To insure such profits they secured agreements with Bristol guaranteeing them bulk tetracycline at $350.00 a kilogram, roughly one third the established price for the finished product (*ibid.*). In contrast Bristol, Pfizer and Cyanamid made many times this "normal" profit: comparing the list prices shown on page 24, *supra*, to production costs for the same standard dosage, in 1960 Pfizer's production cost was $1.70 and Cyanamid $1.52 for a product they would sell to a druggist for $30.60.

Pfizer and Bristol kept records in the regular course of business showing, product by product, the difference between factory or production costs and sales price a figure labeled "gross profits" by both companies (GX 192, 8760a–8761a; GX 838, 9139a–9163a; GX 842, 9269a–9273a). Their records also showed an "operating" or "adjusted" profit after the deduction of certain selling and promotional expenses, but no "net profit" after deduction of all costs (1794a, 1977a). Cyanamid's records showed net profits, item by item (GX 852, 9862a–9928a; GX 858, 9938a–9981a).

These records (except for GX 858, which was introduced by Cyanamid, 2079a–2080a) placed in evidence by the government and the analysis made from them confirm the wide gap between both gross

and adjusted profits for broad spectrum antibiotics and gross and adjusted profits for the average of all other pharmaceuticals (*e.g.*, GX 842, 9269a–9273a, GX 852, 9865a–9928a). For example, Cyanamid's records show that in 1954 it made a pre-tax profit of $34,502,000 on broad spectrum antibiotic net sales of $73,914,000—this is after deduction of all expenses attributable to these items, including research (GX 852, 9874a).

Each of the defendants and co-conspirators published catalogue prices for private hospitals (Ct. X 4, 6696a), and Cyanamid, Bristol and Upjohn published prices for city, county and state (CCS) hospitals and for the federal government (Ct. X 4, App. B, 6719a–6846a). Because of factors peculiar to the hospital and federal markets, sales of antibiotics to these classes of customers were not accompanied by the same degree of uniformity as sales to the prescription market (*i.e.*, to retailers and wholesalers). For example, sales to private hospitals were often accompanied by "free goods," whereby the seller offered a quantity of products free with the purchase of a given product (see *e.g.*, 1836a–1838a, 2587a–2589a, 3065a–3067a). In the federal and CCS markets, sales were usually by formal bids, and prices did vary and in general trended downward (Ct. X 9, 6920a–6936a; Ct. X 11, 6943a–7329a–1; 2586a–2590a).

In bids for federal government procurements when European firms competed, however, their offers were often one-third to one-half those of American firms

(Ct. X 9, 6928a, 6932a–6936a). Whether European producers competed or not, there was no tendency by the American firms to move from an established price range (Ct. X 9, 6923a–6936a). American bids were often nearly identical and in some instances firms with identical bids were unwilling to reduce prices to obtain a contract. (*ibid*).

In one instance the Military Medical Supply Agency (MMSA) in 1957 requested bids on 454,930 bottles of tetracycline oral suspension in 75 cc bottles and received quotations of $1.83 per bottle from Bristol, Pfizer and Cyanamid (Ct. X 9, p. 7; 6926a). But because Pfizer bid on the basis of 70 cc bottles the request for bids was withdrawn. The MMSA then offered to give Pfizer the entire award if it would lower its price by several cents per bottle, an offer which Pfizer rejected, but countered with an offer to share the award with Bristol since they had bid the same price. The MMSA rejected this offer and reissued the bid but for 70 cc bottles (2606a–2607a, 2648a–2659a, GX 897, pp. 2–3, Ct. X 9, p. 4 6926a, 10269a–10270a). Pfizer and Cyanamid again submitted bids of exactly $1.83 per bottle, but Bristol submitted a bid of $1.828 and won the award, which totalled $830,624.92 (Ct. X 9, p. 4, 6926a, GX 906, p.1. 10277a).

Bristol won the award not by competing on its tetracycline price but because at the request of the MMSA Bristol determined that it could get the 70 cc bottles at .2 cents less than 75 cc bottles (GX 905, 10276a), and Bristol passed on the "savings," which

totalled $908.60, to the MMSA. Bristol's Treasurer calculated that the pre-tax profit on this contract, which constituted almost the entire federal business Bristol did in 1957 (2975a), "is expected to be $562,000" (GX 188, 8745a–8748a).

THE PROCEEDINGS BELOW

The trial lasted nine weeks; the printed record contains more than 12,000 pages. The government's case involved three broad categories of proof: (1) data bearing on prices, production costs, gross profits and market shares; (2) testimony of defendants' officials concerning the various arrangements among the defendant companies and co-conspirators; and (3) testimony and documents relating to the misleading of the patent examiner. Defendants' strategy was to develop their defense largely through cross-examination of their own officials during the government's case. Pfizer called one witness; the other defendants offered no evidence after the government's case was completed. The district court delivered a lengthy charge, and the jury returned guilty verdicts.

In reversing the convictions, the court of appeals held that the instructions to the jury were erroneous in five respects; and that on one of those five issues the trial court had improperly restricted the defendants' ability to argue to the jury. We discuss these rulings in detail in the argument.

A principal ground upon which the court of appeals reversed was the court's conclusion that the case was submitted to the jury on a different theory from that specified in the indictment and the bill of particulars.

The court interpreted these documents as charging that specific agreements had been entered into at specific meetings between specific individuals, *i.e.*, at the Pfizer-Cyanamid meetings in November 1953 and the Pfizer-Bristol meetings in December 1955. But the charge treated the case as based upon a general course of conduct throughout the years, thus, the court of appeals held, misleading both the jury and the defense.[17]

The court further held that because the case was based upon specific agreements, the testimony of defendants' officials denying the existence of any illegal agreements or understandings was crucial and the jury should have been told that in order to convict it had to find that those officials had lied. The court of appeals also ruled that the instructions unduly stressed the evidence relating to unreasonably high prices and profits and fraud on the Patent Office, thereby distracting the jury's attention from whether the participants had entered into illegal agreements at the meetings.[18]

Following the grant of the government's petition for rehearing *en banc*, the panel issued a short opinion denying rehearing (12617a–12619a; 437 F. 2d 957). The panel acknowledged that it had failed to take adequate account of the portions of the bill of particulars alleging a tacit understanding or agreement. The panel stated that "we do not rely upon the express agreement contention as a ground for reversal." It concluded, however,

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[17] 12587a, 12590a, 12593a, 12594a–12602a, 12610a–12611a; 426 F. 2d at 34, 36, 37, 38–43, 47–48.

[18] 12598a–12600a, 12602a, 12611a, 426 F. 2d at 40–41, 43, 48.

that "taken as a whole" the other errors found denied the defendants a fair trial.

On the basis of the opinion denying rehearing, the full court, dividing four to three, denied rehearing *en banc* (*id.*).

SUMMARY OF ARGUMENT

After a long and fairly conducted trial in which the government presented comprehensive evidence of conspiracy to fix prices and to monopolize, and in which the defendants presented little evidence in rebuttal, the jury convicted all three defendants on all counts.

The court of appeals reversed primarily for faults it found in the charge to the jury. These faults related principally to what the court of appeals found to be incorrect emphasis on certain issues in the trial. The court of appeals, however, as it recognized in its second opinion, initially mistook the case as one in which an express agreement at a particular time and place had to be proved, rather than a course of conduct showing a tacit agreement or understanding not to compete as to price and to restrict entry into the market. The court of appeals also applied an inappropriate standard for judging the instructions by combing the record for possible errors or for language that viewed in isolation might be criticized but that was correct in the context of the lengthy trial.

I

The jury had full evidence on the market and the defendants' pricing policies. The government intro-

duced and relied on exhibits taken from respondents' records and the testimony of respondents' officers. This evidence showed standardized packaging and pricing, high profits, and failure of any of the respondents to lower prices as production costs dropped, as market shares were lost, and as new products were introduced, despite prior price competition in the same market. Respondents were permitted to present countervailing evidence but as a matter of trial strategy did not do so.

The government also presented evidence that the respondents misled the patent office, settled patent claims, sold to one another, licensed one another and refused to license others in a manner consistent only with an understanding that they would not compete as to price and would prohibit others from entering the market.

The court's charge on these important issues properly instructed the jury on the right of the respondents' independently to charge whatever prices they wish, the significance of patents, the right of a holder to grant licenses or not as he sees fit but not to agree with his licensees not to license others and the right of the parties to sell to one another. It stressed that the jury must decide whether this and the other evidence presented it showed an agreement or understanding between two or more of the defendants that they would not compete as to price and would restrict entry into the market. The instructions were careful, fair and in accord with the decisions of this Court.

II

Parke, Davis was neither indicted nor named as a co-conspirator, although many of its practices were similar to those of the respondents and co-conspirators. The government admitted that it did not consider Parke, Davis a conspirator and pointed out the many differences between its conduct and that of the conspirators. The respondents sought an instruction in which the judge would list the similarities between respondents' behavior and that of Parke, Davis without mentioning the differences. Respondents also wanted to argue the "presumption of innocence of Parke, Davis."

The trial judge properly refused these requests the first as one sided, the second out of concern that it would confuse the jury by suggesting that indictment removes the presumption of innocence. The judge properly allowed the parties to argue fully the significance of the similarities and differences between Parke, Davis and the respondents and co-conspirators but not to argue a presumption of innocence of a non-party. The charge given by the trial judge was fair and his handling of this issue was careful and correct.

III

Pfizer and Bristol (which represented Squibb and Upjohn in the negotiations) settled their patent dispute by a license from Pfizer to Bristol to manufacture tetracycline, sell it in bulk to its present customers, and sell it to the trade. Bristol obtained from

Pfizer for Squibb and Upjohn, licenses to sell to the trade but without permission to manufacture or sell in bulk. The effect was that Pfizer avoided embarrassing litigation and Bristol made certain that Squibb and Upjohn would remain customers. The government did not claim that these agreements were illegal *per se* but only that they formed part of the circumstantial evidence of conspiracy. The trial judge properly so instructed the jury. The trial judge referred to the licenses to Squibb and Upjohn as restricted. This was the same terminology the respondents and co-conspirators had used in testimony in the trial.

The supposed errors that the court of appeals found reflect an out-of-context interpretation of language meant to be understood by a jury familiar with the terminology of the witnesses. The district judge properly refused to instruct the jury that they could not consider these agreements as part of an agreement to limit manufacturing rights. The court correctly instructed that evidence of the settlements and licenses should be considered with all other evidence to determine "whether [it shows] the presence of a conspiracy, the absence of a conspiracy, or nothing either way" (4966a–4967a).

IV

The government did not allege or attempt to prove that Bristol had joined the conspiracy prior to its settlement with Pfizer in December 1955. The court of appeals would have required an instruction that Bristol's pre-December 1955 conduct could not be considered as proof of conspiracy, and complained that the instruction the judge actually gave may have allowed the jury to

convict Bristol if it found Bristol conspired even before December 1955. This is pure speculation ungrounded in the record. It was clear throughout the trial that the government was not claiming that Bristol entered the conspiracy prior to its December 1955 agreement with Pfizer. Evidence of Bristol's activities before December 1955 was nevertheless important and admissible as showing Bristol's motive for joining the conspiracy, its method of operation, and how the conspiracy came about.

V

Considered together any possible errors were not of sufficient magnitude to justify reversal of a jury verdict in a trial that was essentially fair and in which respondents had both the resources and legal talent to present their case fully to the jury. To allow the appellate decision to stand will create a dangerous impediment to the enforcement of laws designed to insure competition and free entry into the marketplace. Perhaps more important, the precedent could become a ground for reversal in any case where organized or complex criminal activity is at issue and the trial is lengthy and routine instructions cannot be relied upon.

ARGUMENT

INTRODUCTION

"In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure."

Johnson v. *United States*, 318 U. S. 189, 202 (Frankfurter, J. concurring). This was a trial in which the government proved that the three defendants and two co-conspirators had held to virtually the same prices for all broad based antibiotics from six to ten years, despite changes in supply, demand, market shares, production costs, and despite the introduction of tetracycline.

The jury had comprehensive exhibits, facts, and figures showing that this was not normal market behavior and that no exigencies of cost dictated the rigidity of prices. In addition, the jurors heard from the mouths of the corporate executives a history of prior competition replaced by cooperation, intercompany sales and licensing, and withholding information from the Patent Office to obtain and preserve a questionable patent.

The jury was in a position to judge the credibility of the witnesses and to gauge the significance of the evidence to the charges of conspiracy. The instructions to the jury repeatedly directed them to the question: Did this all come about by independent action or did the defendants have an agreement or understanding—did they conspire?

There was ample evidence to convict. The jury did convict and it is unlikely that the jury would have been misled by any subtleties of the judge's instructions.

The appellate court considered this a "close case." It approached the language of the charge with a punctiliousness, we submit, more appropriate to statutory

interpretation or contractual ambiguity than to a careful and comprehensive charge to a jury considering the extensive evidence in a complicated antitrust case. We submit this standard was inappropriate.

In its two opinions, the court of appeals criticized various portions of the trial judge's instructions. For convenience we have divided these into four major groups:

1. The instructions concerning defendants' prices and profits, the denial of wrongdoing by defendants' officials, and the history of the tetracycline patent applications.

2. The instructions concerning Parke, Davis, which was not a conspirator and whose activities paralleled the conspirators in some respects but not in others, and the scope of argument permitted.

3. The instructions concerning the Pfizer-Bristol arrangements and the grant of non-manufacturing licenses to Squibb and Upjohn.

4. The instructions pertaining to activities of Bristol before it joined the conspiracy.

We submit that upon reviewing the instructions in these areas, it is clear that while there can be *ex post facto* discussion as to whether particular language should or should not have been used, the instructions in their totality were in accordance with the law and scrupulously fair.[19] The instructions, of course, must be viewed as a whole and in the context of the entire

[19] For a careful discussion of the instructions in this trial, see the opinion of the district court denying respondents' motion for a new trial (6446a–6473a, 281 F. Supp. 837 (S.D.N.Y.)).

trial; particular portions of the charge must not be viewed in isolation or treated as if they constituted the court's entire treatment of the subject. Cf. *Andres* v. *United States*, 333 U.S. 740, 745; *Kotteakos* v. *United States*, 328 U.S. 750, 763; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242.

I. THE INSTRUCTIONS CONCERNING PRICES AND PROFITS, THE DENIALS OF WRONGDOING BY DEFENDANTS' OFFICIALS AND THE HISTORY OF THE TETRACYCLINE PATENT APPLICATIONS WERE CORRECT.

A. IN AN ANTITRUST CONSPIRACY CASE, EVIDENCE THAT SUPPOSEDLY COMPETING FIRMS MAINTAIN UNIFORMLY HIGH PRICES OVER AN EXTENDED PERIOD DESPITE SHIFTING MARKET SHARES AND DIFFERING PRODUCTION COSTS, IS A SIGNIFICANT FACTOR TO BE CONSIDERED WITH OTHER CIRCUMSTANTIAL EVIDENCE.

In its initial opinion, the court of appeals based its condemnation of the instructions dealing with the allegations of "unreasonably high prices and profits" on the ground that the time devoted in the instructions to this issue overemphasized the importance of this admittedly relevant evidence at the expense of the "primary issue"—whether express agreements were made at the "critical" November 1953 and December 1955 meetings (12598a–12602a, 426 F. 2d at 41–43). It concluded that because of this supposed imbalance in the instructions "the jury * * * entered upon its deliberations with its attention diverted from the real issues to patent fraud and unreasonably high prices—both inflammatory issues" (12602a, 426 F. 2d at 43). But the court of appeals in its first opinion was mistaken as to the primary issue of the case, as it ac-

knowledged in its second opinion (12618a, 437 F. 2d 957). The issue was not whether there was an express agreement but whether all the evidence of defendants' conduct showed a tacit understanding that the respondents would not compete as to price and would restrict entrance to the market. This fundamental error in the first opinion of the court of appeals permeated the court's consideration of the case and led to the erroneous reversal. The trial judge did not similarly misconstrue the nature of the case.

High prices of themselves do not prove an illegal conspiracy in violation of the Sherman Act. See, *e.g.*, *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 395–401; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222, 229, 243. On the other hand, the level of prices and profits has a most important bearing on the charges of both conspiracy and monopolization in a case such as this. This Court has recognized that "an artificial price level not related to supply and demand of a given commodity may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred." *Cement Mfrs. Protective Assn.* v. *United States*, 268 U.S. 588, 606.

In *American Tobacco Co.* v. *United States*, 328 U.S. 781, this Court noted that the defendants, who had raised their prices during a period of declining manufacturing costs and maintained them although demand fell, had reaped "tremendous profits as a result of the price increase." *Id.* at 805–806. This price increase—unrelated to "costs of production or to economic con-

ditions generally" (147 F. 2d 93, 103 (C.A. 6))—and a price reduction made only when competition from others was felt, were said to constitute "circumstantial evidence of the existence of a conspiracy and of a power and intent to exclude competition." *Id.* at 328 U.S. at 804. Again, in *United States Maltsters Ass'n* v. *Federal Trade Commission,* 152 F. 2d 161, 163 (C.A. 7), proof that prices had remained stable while the cost of the principal ingredient of manufacture "varied considerably" and the "manufacturing costs of the various members [of the Association] varied as much as 20 to 30%" was part of the circumstantial evidence relied on to support an inference of conspiracy. See, also, *Triangle Conduit & Cable Co.* v. *Federal Trade Commission,* 168 F. 2d 175, 179 (C.A. 7), affirmed *sub nom. Clayton Mark & Co.* v. *Federal Trade Commission,* 336 U.S. 956; *United States* v. *Eli Lilly & Co.,* 24 F.R.D. 285, 289–294 (D.N.J.).[20]

If firms accused of price-fixing or monopoly object to the government's economic analysis, they may introduce their own evidence "that they were following an economically dictated practice of conscious parallelism of prices, rather than engaging in any illegal con-

[20] See also *C-O-Two Fire Equipment Co.* v. *United States,* 197 F. 2d 489, 492 (C.A. 9), certiorari denied, 344 U.S. 892, and Areeda, *Antitrust Analysis:* Problems, Text, Cases, 222 fn. 22 commenting on *C-O-Two:* "The finding of conspiracy is not only supported but compelled by evidence of identical prices coupled with such 'plus factors' as previous illegal conduct, 'artificial' product standardization, raising prices at a time of surplus, policing dealers to effectuate resale price maintenance, uniform use of a delivered pricing system, and submission of identical bids to public agencies."

spiracy to fix prices." *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 141 (C.A. 6). Sherman Act defendants may offer "explanatory economic evidence" consisting of "proofs of similarity of costs, operations, marketing procedures, and other economic factors affecting price changes, alleged to be common to all, and [have] expert witnesses * * * testify in support of their theory." *Id.* at 141, 146. See also *Maple Flooring Mfrs. Ass'n.* v. *United States*, 268 U.S. 563, 567–568; *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 367–369 (C.A. 8), certiorari denied, 339 U.S. 942; *Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F. Supp. 914, 951–952 (S.D.N.Y.).

High profits are also relevant "along with myriad other circumstances for the purpose of determining whether in combination they are elements in the generation of that power to monopolize that constitutes violation of the law." *United States* v. *General Electric Co.*, 82 F. Supp. 753, 895 (D. N.J.); see *id.* at 894–895; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 804–806; *United Banana Company* v. *United Fruit Company*, 245 F. Supp. 161, 176–177 (D. Conn.), affirmed, 362 F. 2d 849 (C.A. 2); *Banana Distributors, Inc.* v. *United Fruit Company*, 162 F. Supp. 32, 39 (S.D. N.Y.), reversed on other grounds, 269 F. 2d 790 (C.A. 2).[21]

[21] See the district court post trial opinion, 6453a–6461a, 281 F. Supp. at 842–848.

B. THE INSTRUCTIONS ON THE SIGNIFICANCE OF PRICES AND PROFITS WAS APPROPRIATE AND CORRECT

The court's charge on evidence of high prices was both legally correct and fair. The essence of the charge was as follows:

> I come now to the allegation among the asserted "means and methods" that defendants maintained prices which were "unreasonably high." It is necessary to leave you with several thoughts concerning this specific topic.
>
> To begin with, I must emphasize and be sure you understand with perfect clarity, that neither the Sherman Act nor any other law that concerns us in this case imposes any limit on the price a company may charge for its commodity. So far as the law is concerned, so far as we have it for this case, a manufacturer is perfectly free to produce a commodity that costs him a dollar and sell it for $100 if he can find customers willing to pay that amount.
>
> The Sherman Act does not entitle any court or any jury to impose personal or private or any other kinds of restrictions upon the setting of prices by businessmen exercising their independent and competitive and self-interested judgment. It would be utterly wrong in short for any of us to be influenced even in the slightest degree in this case by any notion that drug prices were too high or too low or even just right, and I add those words "just right" to be sure that we return to and stay centered upon the true problem in this case, and that is the subject as I have repeated it over and over again, of alleged price fixing by agreement.

I have told you before, and stress it again, that this is the kind of conduct against which the Sherman Act is directed in the aspect of present relevance. If prices are fixed in the way forbidden by that Act, it makes no difference that they are fixed at a happy or low or suitable or high and unpleasant level. Price fixing at any level is what is outlawed.

I am trusting that you have these repeated thoughts firmly in mind. I return then to the question of what significance, if any, there may be in this case in the charge that the defendants' prices were "unreasonably high."

In the light of what I have just said, I think you will find it helpful to translate the word "unreasonable" to mean "unusual" or "artificial" or "extraordinary." By these suggested definitions I am trying to convey the thought that the idea of unreasonableness in the present context is meaningful only if it is understood to refer to kinds of price behavior or price levels which appear to be divorced from variations and differences in available supply or demand or cost or other economic factors that may normally be expected to cause variations or changes in the prices charged in a competitive market.

To put the thought in another and slightly shorter way, the charge of unreasonableness in this case is material only insofar as it poses the issue whether the prices involved exhibited qualities or peculiarities of a type that could be deemed evidence that such prices resulted from agreement rather than from competition. [4993a–4994a.]

This is not the court of appeals telling the district court what its charge should have been. This is the district court's charge in the press and heat of trial. It would be hard to draft a less inflammatory charge." The judge directed the jury away from emotion and towards the law.

Concerning the comparison of production costs to prices, the court cautioned the jury that production costs omitted cost items that should be included to calculate net profits. The court reminded it of the defendants' contentions that gross profit data are misleading and meaningless, that their prices were in no way unreasonable or artificial, and that competition often results in price uniformity despite variations in production costs among sellers. Finally, the court instructed that if the jury did not find defendants' prices and profits unreasonable, it should not consider that allegation; but that if it did find prices and profits unreasonable, that could be a factor, together with all the other circumstances, that would support an inference of an agreement on price, and would also tend to support the monopolization charge (4993a–4999a).

This careful, comprehensive and correct charge, together with the full opportunity respondents had to present such evidence on costs and profits as they wished (see *infra*, pp. 48–49), refutes any contention

[22] As the district court noted in its post trial opinion, respondents never submitted meaningful requests to charge on this issue, although repeatedly requested by the trial court to do so (6455a; 281 F. Supp. at 843).

that the instructions on costs and profits were unfair or prejudicial.

The district court's charge on that issue fully and fairly sets forth the significance of these facts and the weight the jury was entitled to give to them. See, *e.g.*, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 804–806. If, as the court of appeals suggests, the giving of such an instruction is reversible error, the government's ability successfully to prosecute price fixing and monopolization cases in oligopolistic industries will be seriously weakened.

C. THE EVIDENCE OF HIGH PRICES AND PROFITS WAS NOT MISLEADING

Defendants complained that the evidence on profits was incomplete and inflammatory in that expenses other than production costs were not placed before the jury (12594a, 426 F. 2d at 38). This is not correct. In the first place, production costs were not something invented by the government but were used by the defendants themselves in their ordinary business accounting (see fn. 16, *supra*). Further, both the chief executive of Bristol and the chief executive of Upjohn stated that production costs multiplied by a factor of three or four provide a rule of thumb for pricing in the industry (2900a, 3173a–3176a). While there are obviously other costs to be considered, the jury in thinking about prices should be able to use the same rule of thumb a corporate executive used. For both it is a way to make a complex subject understandable.

Second, the evidence of unusually high profits presented to the jury went far beyond the production cost/selling price ratio. For example, Government Exhibit 842 (9269a–9273a) gives Pfizer's own comparison of cost data, and estimated profits at various stages. Using 1957 as an example, these figures show "operating profits" on broad spectrum antibiotics compared to all products including broad spectrum antibiotics to be as follows:

All products including broad spectrum antibiotics:	
Sales	$59,341,000
Operating Profits	23,886,000
Broad spectrum antibiotics:	
Sales	36,112,000
Operating Profits	20,069,000[22]

The government's evidence relating to costs and profits was taken from records the companies kept in the regular course of business (See page 26, *supra*). The high prices and profits were simply a fact. The jury was not misled.

Moreover, the record shows, as the dissent noted, that "[d]efendants had it within their power to introduce their own evidence on costs" (1261a, 426 F. 2d at 49). The district court did not exclude any evi-

[22] If a further computation is made (by subtracting total sales of broad spectrum antibiotics from total sales, and operating profits for broad spectrum antibiotics from total operating profits) one sees that in products other than antibiotics sales of $27,299,000 produced profits of $3,815,000. Even more comprehensive cost and profit comparisons for Cyanamid, which kept more complete records, were introduced by the government. See GX 852, 9862a–9928a; GX 855, 9933a–9934a; GX 856, 9935a–9936a; GX 862, 10024a–10086a.

dence the respondents offered relating to their total costs.[24]

Although the court refused to permit respondents to introduce such evidence during their cross-examination of government witnesses, this ruling was simply a postponement of its admission, not a permanent exclusion. Indeed, respondents' counsel expressly admitted their understanding that nothing was being permanently excluded on the subject of defendants' costs (1687a–1688a).

The evidence whose admission was thus postponed consisted of special cost studies, which had been prepared for litigation (see 840a, 844a–847a, 1704a–1707a,

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[24] In their briefs on appeal respondents made elaborate economic arguments as to the normalcy of parallel or even static pricing in an oligopoly and the insignificance of production costs. Respondents did not present this material to either the judge or jury below. The arguments, however, are not persuasive in explaining not merely price leadership but ten years of utterly static pricing. That this is an expectable feature of oligopoly without agreement is at best questionable. It was not the prior history of broad spectrum antibiotics. Further as noted in *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F. 2d 953, 965–966 (C.A.D.C.):

> * * * [I]n practice it appears that firms selling in such a market do not always seek a uniform monopoly price and, if sought, do not always attain it. Among the reasons why uniform monopoly prices are not sought or attained is that one seller may believe he can maximize his profits by expanding his total sales rather than taking a maximum profit on each sale. Also, even the mere addition of one seller to an oligopoly market makes the market more complex and less predictable. Therefore, there may be competitive actions and reactions in an oligopoly market. [See, also, *C-O-Two Fire Equipment Co.* v. *United States*, 197 F. 2d 489–493 (C.A. 9), certiorari denied, 344 U.S. 892.]

1847a–1849a; Bristol exhibits for identification, 621, 622, 623, 624, 12420a–12458a). The trial court postponed its admission until it could be introduced through qualified witnesses, and the government could have the opportunity to examine the data underlying the studies in order to prepare for cross-examination (1848a–1849a, 1988a–1990a). The trial court was expressly assured that respondents had available qualified witnesses through whom they could introduce their studies (1707a–1708a, 1989a–1990a). Studies relating to Squibb's total costs (Pfizer X 602–605, 12513a–12527a), the admission of which, like respondents' special cost studies, had been initially postponed (2238a–2241a), were later received in evidence without objection (4426a–4428a).

Respondents, of course, could have introduced their studies as part of their defense, but for their own reasons they elected to submit the case to the jury on the basis of the government's comprehensive evidence. Whatever was "withheld from the jury" on this subject was not by "exclusion," but as a result of respondents' own decision (see 4564a–4565a).

D. THE CHARGES ON THE DENIALS OF WRONGDOING BY THE DEFENDANTS' PRINCIPAL OFFICERS WERE APPROPRIATE AND CORRECT

The defendants' principal officers had denied that in their various meetings they had agreed to limit price competition or to try to achieve monopoly power.[25] Some denials were specific, *e.g.*, that at a particular meeting price was not discussed (2562a); many were

[25] See 2365a–2366a, 2373a–2375a, 2428a–2429a, 2562a–2564a, 2734a–2735a, 2758a–2759a, 2774a–2775a, 2850a–2851a, 3081a–3082a.

general—that there was no agreement or understanding as to price or entry into the market (*e.g.*, 2734a–2735a). The officers also testified as to business reasons for particular actions (*e.g.*, 2549a). The court of appeals, in its first opinion, criticized an isolated part of the trial judge's charge on denials of guilt (12598a, 426 F. 2d at 40). The trial court had charged:

> Along with all the other evidence in the case, you have heard the sworn testimony of the principal officers of the three defendant companies, and you have heard each of them deny in broad terms that there was any understanding or agreement among them, either express or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. You must, obviously, give due and deliberate thought to this testimony, and ultimately attribute to it such weight as it permits in your impartial judgment. In performing this task, you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling among other things, that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter. You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the conspirators did not believe

> they were violating the law or intend to commit such a violation.
>
> This is by no means to suggest to you that you overlook or reject the sworn testimony of defendants' officers. That's for your judgment, not mine. The point being made here, as you understand, is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you [5000a–5001a].

The court of appeals treated this portion of the charge as if it were the only charge on credibility and as if the trial court had ignored the specific denials and explanations of the defendants' officers (12598a, 426 F. 2d at 40). The trial judge, however, had charged fully on the credibility of witnesses (5003a–5005a). The court had also made numerous references to the business explanations of defendants' action and had charged the jury repeatedly that the actions were entirely lawful if taken individually and the jury was to consider whether they were normal independent business decisions or unlawful conspiratorial activity (*e.g.*, 4956a, 4967a, 4971a, 4989a). The portion of the charge criticized by the court of appeals properly concentrated on the effect of the general denials of wrongdoing:

The charge was correct. Whether an "agreement" illegal under the Sherman Act has been made is a mixed question of fact and law. *United States* v. *Gypsum Co.*, 333 U.S. 364, 396. See also, *United States* v. *General Motors*, 384 U.S. 127, 141, n. 16;

United States v. *Parke Davis & Co.*, 362 U.S. 29, 44–45; *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194, n. 9. In cases of this type, officials of defendant companies frequently deny that they have entered into any illegal agreements. Such denials may be deliberate untruths or may rest upon the witness' honest but mistaken view of the legality of their acts. The denials are just one factor that the jury must take into account in the light of all the evidence bearing on the issue.[26]

The court of appeals' final criticism was that "[t]o allow the jury to convict without finding that these denials were untrue would free the government from its basic theory of the case and allow it to rely on any understanding that might be inferred from other conduct" (12598a, 426 F. 2d at 40). This criticism is consistent only with the court of appeals' initial erroneous view that the government was required to show a specific express agreement. As the court of appeals' second opinion recognized, "On reconsideration, we believe the Government's point is well taken and we do not rely upon the express agreement contention as a ground for reversal" (12618a, 437 F. 2d at 958). Since the instruction directed the jury to consider the totality of the circumstances, it was correct.

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[26] See *e.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44: "* * * judicial inquiry is not to stop with a search of the record for purely contractual arrangements * * *. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." See also *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 195.

E. THE INSTRUCTIONS ON THE PATENT PROCEEDING WERE APPROPRIATE AND CORRECT

Among the "means and methods" by which the indictment alleged the conspiracy was effectuated were those relating to the manner in which Pfizer's tetracycline patent was obtained. It alleged that "Cyanamid assisted and cooperated with Pfizer in obtaining for Pfizer a patent on Tetracycline" (Ind., ¶46 (c), 34a) and that "Pfizer and Cyanamid and Bristol [27] withheld pertinent and material information from the Patent Office and otherwise misled the Patent Office prior to the issuance of Pfizer's Tetracycline Patent" (Ind., ¶46 (e), 34a). The facts relating to these contentions were complex. If the jury was to consider the significance of this evidence and to make an intelligent determination as to whether it supported the government's allegations, it had to be given a background against which it could evaluate the contentions of both sides.

To this end, the instructions summarized the parties' basic contentions on the patent aspects of the case; described Patent Office procedure with particular reference to the applications, declaration of interferences and settlements which were an important part of this case; described the duty of patent applicants to disclose to the Patent Office material facts relevant to their applications; outlined the factual dispute between the parties relating to what information the Examiner had requested from the

[27] The allegation as to Bristol was subsequently withdrawn, 4525a–4526a.

applicants; and mentioned some of the evidence in connection with the arguments both sides had made on the question whether Cyanamid and Pfizer, respectively, had deliberately deceived the Patent Office pursuant to or in furtherance of the conspiracy charged (4967a–4890a).

In its first opinion the court of appeals held this approach erroneous because it read the instructions as having "stressed" the "patent situation," which together with the "stress" on unreasonably high profits and profits, improperly diverted the jury from determining what the court then thought was the primary issue—whether express agreements had been made at specific meetings (12599a–12600a, 12602a, 12611a, 426 F.2d at 41, 43, 48).[28] The court of appeals condemned these instructions because "nowhere was the jury told in clear language that the Patent Office proceedings were relevant only insofar as the acts of Pfizer and Cyanamid supported an inference that at the November 1953 meetings they had entered into agreements to fix prices or exclude others" (12599a–12600a, 426 F. 2d at 41).

The court of appeals' proposed instruction would have been incorrect. It improperly assumes that the conspiracy must have been expressly agreed to on those dates. The instructions as given by the district court were more accurate and fully as cautious: The

[28] Unlike the instructions relating to the price and profit aspects of the case, the "patent fraud" part of the instructions was not referred to in the court of appeals' opinion denying rehearing.

instructions on cooperation between Pfizer and Cyanamid before the Patent Office were:

> Now, in connection with the charge that Cyanamid assisted Pfizer to obtain a patent in order to seek unlawful conspiratorial objectives, you will, of course, want to review the evidence you have heard concerning the extent to which the positions of Pfizer and Cyanamid may have indicated cooperation and mutual support, and the extent to which such actions displayed the individual pursuit of their individual interests by these separate companies.
>
> To what extent, if at all, did Cyanamid actually appear to be helping Pfizer to obtain a patent under which Cyanamid would thereafter be required to pay royalties and non-licensed producers of tetracycline might be excluded? To what extent did Cyanamid, pursuing its own goals, oppose and resist Pfizer's application on legitimate and available grounds?
>
> Considering both the evidence of what Cyanamid did and the explanations of its officials for these actions, was this the normal and self-regarding conduct of a competitive company? Or did it reflect the existence of an understanding and joint purpose by Cyanamid and Pfizer to pursue the objective of excluding competition or fixing antibiotic prices?
>
> You should carefully consider all of the testimony and documentary evidence concerning the first and second patent interferences, the Pfizer-Cyanamid settlement of the first interference, and the circumstances surrounding these proceedings, to determine whether this

evidence tends to show the presence of a conspiracy, the absence of a conspiracy, or nothing either way [4970a–4971a].

The instruction with respect to Pfizer and Cyanamid misleading the Patent Office stated:

> Let me summarize this subject by saying that before you may treat the evidence under this heading [whether Pfizer and Cyanamid withheld pertinent and material information from and otherwise misled the Patent Office] as proof of guilt, you must find beyond a reasonable doubt three things:
>
> First, that the representatives of either Pfizer or Cyanamid, or both, knowingly misrepresented or withheld material information from the Examiner.
>
> Second, that but for such deception, the Examiner would not have allowed the Pfizer application on January 11, 1955, or for at least some substantial period thereafter.
>
> Third, that such deception was practiced by either Pfizer or Cyanamid, or both, pursuant to or in furtherance of the alleged conspiracy [4979a–4980a].

Since the issues and evidence having to do with the allegations of Patent Office misconduct were technical and complex, the court had to devote considerable time to explaining them to insure that the jury would enter its deliberation properly focused. The court of appeals erred, we submit, in concluding that this explanation in the instructions, the length of which was due to the complexity of the subject matter, constituted an improper stress on an inflammatory is-

sue. Deception of a patent examiner by major corporations may indeed arouse emotions, but to the extent this is so it is an unavoidable consequence of exposing the course of action that defendants chose and is not attributable to any misinstruction by the trial judge. The instruction given de-emotionalized the issue by explaining the significance of the evidence in relation to the violations charged and calling for preliminary findings before the evidence could be considered as proof of guilt.

Finally, the length of the instructions dealing with the patent aspects of the case came as no surprise to the respondents. Their requested instructions on this subject were themselves lengthy (see 5164a–5167a, 5169a–5172a, 5204a–5216a, 5216a–5222a, 5543a–5549a), and the district court took the somewhat unusual step of giving the parties a part of its proposed charge on this topic well in advance of delivering it to the jury and invited them to comment on it (4681a–4693a). None of the respondents asserted that it was unduly long; they simply suggested minor changes and corrections (7330a–7332a, 7339a–7340a, 7341a–7344a).

Not long before it heard this case, the court of appeals held, in *United States* v. *Birnbaum*, 373 F.2d 250, 257 (C.A. 2), certiorari denied, 389 U.S. 837, that:

> In determining whether a judge's charge has exceeded the bounds of propriety, a multitude of factors must be considered. The length of the charge, for instance, must be judged by the

> complexity of the factual and legal issues involved in the case, and the fashion in which counsel presented them to the jury. The trial judge is best suited to determine how detailed his charge must be in order that the jury derive the maximum benefit. Therefore, an appellate court should not decide that a charge is defective by a mere count of the pages in the record. * * *

Under that standard—the proper one, we submit—the district court's instructions on the patent aspects of this case were proper.

II. THE RULINGS AND INSTRUCTIONS CONCERNING PARKE, DAVIS WERE CORRECT

Parke, Davis, one of the four firms manufacturing and selling broad-spectrum antibiotic drugs, was neither indicted nor named as a conspirator and the government conceded that "it absolutely was not" a conspirator (4526a–4527a). Certain of Parke, Davis' practices (its prices, package-sizes, dosage forms, and marketing techniques) paralleled those of the defendants who, the government claimed, had acted pursuant to a conspiracy. Others were different. It never handled tetracycline. It never licensed anyone to manufacture or sell its patented antibiotic, Chlromycetin; it never obtained a license for the manufacture or sale of any other broad-spectrum product; it never bought or sold such products in bulk—indeed, it declined Bristol's offer to furnish it bulk tetra-

cycline; and it was not involved in the patent interferences or settlements, the cross-licensing agreements, or the various meetings and negotiations between Pfizer and the other conspirators concerning tetracycline."[29]

One of the defendants' major contentions at the trial was that the fact that a non-conspirator did some of the same things they did showed that their actions did not result from conspiracy.

The court of appeals found reversible error in the rulings and instructions relating to Parke, Davis, because, in its view, the district court:

(1) improperly limited the arguments respondents could make to the jury based on similarities between their conduct and the conduct of Parke, Davis and the fact that Parke, Davis was not claimed to have been acting pursuant to the conspiracy;

(2) failed to refer specifically in its charge to the similarities in conduct between respondents and Parke, Davis, as respondents had requested; and

(3) improperly deprecated the significance of comparisons with Parke, Davis (12602a–12605a, 426 F. 2d at 43–45).

None of these alleged errors remain of substance after an examination of the record of the trial.

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[29] Ct. X 4, pp. 2, 5, 30–156; 6692a, 6695a, 6720a–6846a.

A. DEFENDANTS WERE PERMITTED TO ARGUE FULLY PARALLELS BETWEEN THEIR CONDUCT AND PARKE, DAVIS', SUBJECT TO THE GOVERNMENT'S RIGHT TO ARGUE THE DIFFERENCES; THEY WERE BARRED ONLY FROM ATTRIBUTING EVIDENTIARY SIGNIFICANCE TO THE FACT PARKE, DAVIS WAS NOT INDICTED.

The court of appeals ruled that the district court placed "restriction[s]" on respondents' counsel, in the absence of which they "could have stressed [to the jury] that Parke, Davis quite independently of any conspiracy had paralleled defendants in its pricing and licensing practices both before and after the commencement of the alleged November 1953 conspiracy" (12605a, 426 F. 2d at 44). The record refutes this conclusion.

The district court permitted precisely the argument the court of appeals erroneously believed had been cut off—*i.e.*, an argument based on similarities between respondents' conduct and that of Parke, Davis and the fact that the latter was not claimed to have been a conspirator.

During the trial there was a robing room colloquy on the significance of Parke, Davis' non-indictment. This led the court to ask for submissions on the point. The court noted that an argument based on a third person's non-indictment or presumption of innocence "sounds wrong," but suggested that the Parke, Davis evidence might be used in appraising the government's claim that respondents maintained unreasonably high prices on broad spectrum antibiotics (3517a–3523a).

The non-indictment issue was again raised during the arguments for acquittal at the close of the gov-

ernment's case. The court suggested that both sides might make jury arguments based on the similarities and differences between the alleged conspirators' conduct and that of Parke, Davis (4526a–4531a).

The court finally ruled that it would permit both sides:

> to risk arguments in summation based on comparisons between the defendants and Parke, Davis. I have indicated to you that I think there is a risk in that to which the defendants ought to be peculiarly sensitive.
>
> I must allow the government, if I allow the defendants to do this, to argue the differences at least in rebuttal between Parke, Davis and the alleged conspirators [4646a].

The court also ruled (*id.*) that it would:

> sustain objections to arguments based on the legal notion of the presumption of innocence which I think has no place in that discussion and I think it would be an incorrect legal approach to the subject.

Respondents excepted to the ruling prohibiting references to Parke, Davis' presumption of innocence (4646a–4647a).[30] The district court explained that "the presumption of innocence is what [the defendants] are entitled to and a layering of other presumptions is not useful" (4647a). The court expressly ruled, however, that respondents were free to refer in their arguments on this point to the fact that the government did not claim that Parke, Davis was a

[30] They also excepted to a similar ruling on a slightly altered version of the same proposition—a presumption that business is conducted lawfully (4646a–4647a).

member of the conspiracy.[51] Counsel for Pfizer acknowledged that they were free to argue this (4647a).

In their arguments to the jury, counsel for Cyanamid and for Pfizer both referred to the fact that Parke, Davis was not charged with being a conspirator but had done some of the things that, according to the government, were done by the other defendants pursuant to a conspiracy. Although these references to Parke, Davis were brief, they show that defense counsel did not consider themselves under any prohibition against arguing the point to the jury.

Cyanamid's counsel first discussed the evidence that Parke, Davis, "not claimed to be a conspirator," had reduced its prices to meet those of the defendants and that the defendants in turn had reduced their prices to meet Parke, Davis' reductions (4758a). He also pointed out that a Parke, Davis official, Loynd "who isn't charged in any wrong-doing, specifically denied that there was any agreement with anybody about how he priced his goods, and I suspect if you remember Mr. Loynd you would agree, looking at him, that that would unquestionably be true" (4759a). In discussing the pre-1953 market Cyanamid's counsel reminded the jury that none of the three patent holders "licensed anyone else to make or sell that drug and no one of them sold in bulk to others, and there is no claim at any time in following their respective business policies Cyanamid and Parke,

[51] Mr. Wood [for Pfizer]: "I think we ought to get this one clear. We are free to say that the government does not claim that Parke, Davis is in the conspiracy?

The Court: "Yes. * * *" (4647a).

Davis and Pfizer were conspiring" (4756a–4757a; to the same effect see 4758a–4759a, 4770a). Finally, he pointed out (4770a) that while Cyanamid "did not sell its antibiotic materials in bulk * * * [i]t is true of Parke, Davis also."

Pfizer's counsel referred to Parke, Davis' meeting Pfizer's own price reductions and argued that the reason for this price parallelism was that "It is clear from the acts of Lederle and Parke, Davis and it is not claimed there was any conspiracy between them, that neither of them wanted to be undersold by its competitors in terms of catalog price and Mr. Loynd testified that that was the case" (4811a).

The government in its closing argument mentioned the defendants' references to Parke, Davis. It reminded the jury that it had "heard some reference to Parke, Davis. Parke, Davis did this just like they [respondents] did and Parke, Davis did not do this. Keep in mind Parke, Davis is not named as any conspirator and Parke, Davis did not accept Bristol's invitation and Parke, Davis has not had any licensing arrangement for bulk or any other things. That is enough for Parke, Davis" (4833a).

To be sure, counsel for the defendants might have argued the Parke, Davis point more vigorously. But their failure to do so was not the result of any prohibition of the trial court, which had made it clear that they were free to make the argument, as they briefly did. Rather, their failure to make more of the point may have reflected their counsel's concern that pressing too hard could have led to strong rebuttal

from the government emphasizing the differences between the conduct of Parke, Davis and that of the respondents—as the district court had warned could have happened (*supra*, p. 61). The limited references respondents made in their summations to Parke, Davis thus reflected their own trial strategy rather than any limitation the district court had placed upon them.

The district court's refusal to permit arguments based on the "presumption of innocence" relating to Parke, Davis (12603a, 426 F. 2d at 43) was proper, and, in any event, well within its discretion. All persons are presumed innocent until proved guilty. The fact that one company did some of the things that others were indicted for does not give those acts any special *cachet* of innocence.

Further, had the court allowed defendants to urge that Parke, Davis' non-indictment had some evidentiary significance, the jury might have drawn the impermissible inference that the mere indictment of the defendants carried some implication of their guilt. Both sides had requested instructions on the presumption of innocence attaching to defendants (5122a–5123a, 5226a), and on the proposition that an indictment is entitled to no evidentiary weight and creates no presumptions of any kind (5125a–5126a, 5227a–5228a). The district court ruled that it would give the substance of these requested instructions (4625a, 4657a), and it did so (4943a–4944a). To permit arguments based on the "presumption of innocence" of a non-party or to give an instruction incorporating that

notion, could well have confused the jury by undermining the fundamental principle that an indictment is neutral and that the government must overcome the *defendants'* presumption of innocence.

B. THE DISTRICT COURT PROPERLY REFUSED TO GIVE THE INSTRUCTION ON PARKE, DAVIS REQUESTED BY DEFENDANTS.

The court of appeals ruled that the district court erred in refusing to give the instruction respondents requested on Parke, Davis (12605a, 426 F. 2d at 44–45). The rejected instruction, though a good deal longer than this summary, was to the effect that Parke, Davis had a patent on its broad spectrum antibiotic product, that it granted no licenses and made no bulk sales, that from 1954 through 1961 its product accounted for 23.8 percent of sales in the broad spectrum antibiotics market, that it had substantially the same prices as the defendants and that no one claims the conduct of Parke, Davis was pursuant to a conspiracy (12604a–12605a, 426 F. 2d at 44).

The requested instruction was onesided since it stated the similarities but not the differences between the conduct of respondents and of Parke, Davis. As the district court observed when it declined to give the requested instruction, "I question whether I ought to devote a couple of paragraphs in this way to the similarities between Parke, Davis and the alleged conspirators without then going into the differences * * *" (4711a–4712a). To single out by specific reference in the charge only the similarities between Parke, Davis' conduct and respondents' without mentioning also the differences, would have presented the jury

with an inaccurate and unbalanced picture of the evidence. The district court properly declined to explain to the jury the similarities between the respondents' and Parke, Davis' conduct, and left it to both sides to make whatever arguments they wished.

Moreover, respondents' requested instruction contained the implied notion that any conduct of theirs that was similar to Parke, Davis' was not to be considered as proof of the conspiracy charged. An instruction which conveyed that idea would have been incorrect. While parallel conduct is not itself proof of conspiracy, it may nevertheless form part of the circumstantial evidence which proves an understanding that certain conduct will be followed in the future. To cite but one illustration, uniformity of price in this case, including Parke, Davis' prices, did not by itself prove conspiracy. But price uniformity considered with other facts, such as, for example, the sale to Pfizer by Cyanamid of a very large amount of bulk tetracycline with which to make tetracycline products at a price geared to the then existing market price, supports an inference that the parties to the sale had an understanding as to future prices. (See n. pp. 12–13, *supra*). For the court to suggest that any conduct by defendants which was paralleled by Parke, Davis could not be considered as proof of the conspiracy, would erroneously invite the jury to compartmentalize the evidence instead of viewing each element in the context of the totality of the proof. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699.

The trial court's refusal to summarize in its instructions the evidence of similarities and differences between Parke, Davis and respondents, leaving that task to the parties to perform in their summations, was a reasonable exercise of its discretion. A federal trial judge has "broad discretion in deterimining what evidence he will comment upon * * *," *United States* v. *Light,* 394 F. 2d 908, 911 (C.A. 2). "While a federal judge is privileged to 'sum up the facts to the jury' if these are clearly left subject to its determination, *Starr* v. *United States* [153 U.S. 614, 624–625], he is not required to do so. Whether or not he should, rests 'in his discretion,' *ibid.*, it is within his province, whenever he thinks it necessary.' *Quercia* v. *United States* [289 U.S. 466, 469]." *United States* v. *Kahaner,* 317 F. 2d 459, 479, footnote 12 (C.A. 2) certiorari denied, 375 U.S. 836.

C. THE CHARGE AS TO THE SIGNIFICANCE OF THE PARKE, DAVIS EVIDENCE WAS FAIR AND ACCURATE.

The district court's instructions first referred to Parke, Davis in connection with the conspiracy to monopolize and monopolization counts:

> A conspiracy to monopolize, as charged in Count 2, or the substantive offense of a monopoly actually achieved, as charged in Count 3, must relate to some identified market in a specified commodity or commodities reasonably interchangeable in their uses by purchasers or consumers of such goods. Here, you will recall the market alleged is claimed to be comprised of four broad-spectrum antibiotics: Aureomycin, Terramycin, tetracycline, and Chloromy-

> cetin. In appraising both the conspiracy charge in Count 2 and the substantive charge in Count 3, you will deal, among other things, with the evidence as to market shares held by the defendants and others to determine whether the alleged power reached to an appreciable part of the commerce in question. You will consider in this connection the relative positions of the alleged conspirators in relation to the changing position of Parke, Davis, which, as you know, is not alleged to be a conspirator and which controlled a large and, until 1961, an increasing share of the market in question with its patented product, Chloromycetin [4959a].

Then, near the end of the charge, the district court delivered the following two-paragraph instruction on Parke, Davis, which the court of appeals held constituted prejudicial error:

> I come to one final observation I want to make in these instructions about something included in the evidence you have heard. There has been evidence about Parke, Davis and about Chloromycetin, the broad spectrum antibiotic which is alleged to have comprised part of the market involved in this case. You have learned that Parke, Davis was a substantial factor in that market, and I have mentioned the possible significance of that situation as it affects the question of monopoly and may affect other issues in this case. We have heard of various respects in which the practices of Parke, Davis as to dosages and prices and marketing techniques paralleled those of the defendants and of Squibb and Upjohn. We have also heard some

evidence and argument concerning the differences between Parke, Davis and the defendants on trial here. You are aware, as counsel for both sides have stated, that Parke, Davis is not alleged to have been a member of the conspiracy charged by the government.

Now, insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts about that subject have been placed before you and are part of the total evidence you may consider in reaching your judgment. However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis * * * is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom [5001a–5002a].

Respondents excepted to this portion of the charge (5028a). The court of appeals ruled that the instruction was prejudicial because (1) it "could well have had the effect of stressing the failure to indict, thus carrying the connotation that Parke, Davis might have been guilty but was not indicted for undisclosed reasons," and (2) the concluding sentence of the Parke, Davis portion of the instruction (which told the jury that "the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them * * *" (5002a) "lessened, or might have foreclosed the giving of, any weight which the jury might attribute to the evidence

of Parke, Davis' conduct" (12604a, 426 F. 2d at 44). We submit that both criticisms are ill founded.

(a) What the court instructed was that the jury should *not* speculate as to why Parke, Davis was not indicted. If the jury had so speculated this would hardly have been reversible error. But here it is clear that the jury knew Parke, Davis was not alleged to be a wrongdoer.

Although respondents objected to the Parke, Davis instruction both before and after the charge (4646a–4647a, 5028a), they never suggested to the district judge that the jury might construe the language as a subtle suggestion that Parke, Davis might be guilty of conspiracy to fix prices or monopolize. If that danger was not evident to counsel for respondents, it is not likely that the jury would so construe the language. In fact, the government had just said in its closing argument (4833a):

> Keep in mind, Parke, Davis is not named as any conspirator and Parke, Davis did not accept Bristol's invitation and Parke, Davis has not had any licensing arrangement for bulk or any other things.

The possibility that the jury might have speculated that Parke, Davis might have been guilty but was not indicted for undisclosed reasons was so remote in light of the constant reminders in the trial that Parke, Davis was not considered a conspirator that it should have been disregarded by the court of appeals. It fell far short of the kind of prejudicial error sufficient to invoke the application of the rule permitting appellate courts to notice "errors or defects affecting substantial rights" that were not specifically brought to the trial court's attention. F.R.Crim.P. 52(b).

(b) The court of appeals' second point—that the concluding sentence in the Parke, Davis part of the instructions might have caused the jury to give less weight than it otherwise would have to the Parke, Davis evidence—is untenable when that language is considered in the context of the instructions as a whole and of the entire trial.

Both sides referred to Parke, Davis in their openings, evidence and summations to the extent they thought suitable. In its instructions (5001a–5002a), the trial court reminded the jury of arguments concerning similarities and differences between respondents and Parke, Davis, and pointed out that Parke, Davis is not alleged to have been a member of the conspiracy charged by the government, and that "insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts * * * have been placed before you and are part of the total evidence you may consider in reaching your [verdict]." After then stating that Parke, Davis' non-indictment was irrelevant, the trial court concluded its discussion of Parke, Davis by telling the jury that "the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them * * *."

When viewed as an integral part of the whole instruction, it is simply speculation to suppose that the language suggested to the jury that it ignore the facts presented as to the similarity and differences

1955, "because while Bristol is charged with entering the conspiracy in December, 1955, this provides a background * * *, motive, the context, the ground from which Bristol's activities sprung" (4830a). Then, after again mentioning that "1955 is the year Bristol is alleged to have entered the conspiracy" (4836a), government counsel stated (4866a–4867a):

> * * * We have said that Bristol came into the conspiracy in December 1955, and we will reach that meeting with Schwartz and McKeen, but until that point there is no question * * * they fought as hard as they could, they used every means in their possession, to try to get into this business.
>
> * * * [U]ntil the time * * * Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal, but that's not to say that because they came in late they didn't come in at all * * *.
>
> Never mind what happened before December 1955 as far as Bristol is concerned and this conspiracy is concerned. Keep your eye on what happened after December 1955.

It was against this background that the district court gave its instructions.

B. THE DISTRICT COURT'S INSTRUCTIONS EMPHASIZED THAT BRISTOL COULD NOT BE CONVICTED FOR CONDUCT PRIOR TO DECEMBER 1955.

The trial court instructed the jury that if it found Bristol or the other two defendants guilty, it had to find them guilty of the conspiracy charged in the indictment and none other.

> * * * if any of these defendants is to be found guilty, this finding can rest only upon proof of the conspiracy charged in the indictment. You could not, for example, convict any of the defendants for engaging in other wrongful conduct or for joining in other or different conspiracies. I hasten to add, this is not to imply that there were, or that anyone suggests, such other or different things, but I merely emphasize here the fundamental principle that unless a defendant is found guilty upon the charge as he met and defended it, he or it cannot be found guilty at all [4953a].

Following this admonition, the trial court stated on four separate occasions during the instructions that the government claimed Bristol joined the conspiracy in December 1955 (4963a, 4971a–4972a, 4982a, 4999a).

These admonitions and references by the presiding judge in the context of trial and argument alleging only that Bristol joined the conspiracy in December of 1955 refute any claim that the jury might have been led to find Bristol guilty for conspiring before that date.

C. TO INSTRUCT THE JURY THAT BRISTOL'S PRE-DECEMBER 1955 CONDUCT COULD NOT BE CONSIDERED AS PROOF OF BRISTOL'S BEING IN "ANY" CONSPIRACY WOULD BE A CLEAR DEPARTURE FROM ESTABLISHED PRINCIPLES.

Since evidence of pre-conspiracy conduct is relevant to motive, intent and method of operation, and may also be a basis for showing illegal design (*United States* v. *Houlihan*, 332 F. 2d 8 (C.A. 2), certiorari denied, 379 U.S. 828), both sides had the right to em-

of the activities of the defendants and co-conspirators on the one hand, and Parke, Davis on the other.

In any event, the jury's requests for evidence relating to Parke, Davis during its deliberations and the manner in which the evidence was delivered to it should have laid to rest any doubts as to the possibility that the instruction was construed as forbidding or preventing consideration of the Parke, Davis evidence.[22] The jury's requests themselves indicate that

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[22] On the second day of its deliberations the jury asked for "charts or exhibits showing Parke, Davis share of broad spectrum antibiotic market during period involved as referred to in Judge's charge page 6281 [5001a]" (5071a). After discussion among the court and counsel, the jury was given three exhibits: GX 875 (10244a) showing each of the six companies' total sales of tetracycline and broad spectrum antibiotics for the period 1954 through 1961; GX 877 (10246a) showing each of the six companies' broad spectrum antibiotic sales and market share percentages for the years 1954 through 1961; and GX 909 (10287a) showing the broad spectrum antibiotic sales and market shares of Cyanamid, Pfizer and Parke, Davis for the years 1952 and 1953.

Later that day the jury asked for "the evidence referred to in Judge's charge on page 6281 (line 22) [5001a] concerning Parke, Davis dosages, prices and market technique" (5071a). Again after discussion among the court and counsel the relevant evidence was assembled and given to the jury. First, the district court read the jury paragraphs 6(b), 17, 18(e), 23 and 9 from Stipulation of Facts No. 2 (Ct. X 4, pp. 2, 5, 6, 3, 6692a, 6695a, 6696a, 6693a) dealing with the issuance of the patent covering Chloromycetin to Parke, Davis, its introduction of that product on the market, and the facts that Parke, Davis did not grant any licenses under its Chloromycetin patent and made no bulk sales of Chloromycetin. The jury was then given seven copies of Exhibit B of that stipulation which sets forth the catalogue prices to each trade class for

the jury did not so construe the instructions. But perhaps more important, the trial court's participation in giving the jury the evidence it asked for could only have indicated to it that the court did not believe consideration of that evidence impermissible or misguided.

We submit that the trial court allowed full presentation of evidence and full argument on the differences and similarities of Parke, Davis' conduct, and correctly rejected instructions that would have distorted the significance of Parke, Davis' nonindictment, The defendants' displeasure with these rulings should not be equated with error by the trial judge.

III. THE INSTRUCTIONS CONCERNING THE PFIZER-BRISTOL ARRANGEMENTS FOR THE GRANT OF NON-MANUFACTURING LICENSES TO SQUIBB AND UPJOHN WERE CORRECT.

The court of appeals held that the Squibb-Upjohn instruction conveyed an "incorrect * * * interpretation of the agreements" because from it the jury

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the broad spectrum antibiotics sold by each of the six companies (5071a–5073a).

After retiring briefly the jury was called back so that the rest of the evidence it requested pertaining to Parke, Davis could be given to it. Portions of the testimony of Loynd, Parke, Davis' president, Dr. Malcolm, chief executive officer of Cyanamid, and Jones, the government's statistical expert, were read to the jury. The jury also received copies of GX 928 (10319a–10321a), a tabulation of catalogue price changes of tetracycline, Aureomycin and Terramycin between October 2, 1951 and July 31, 1960, and GX 929 (10322a–10323a), a similar tabulation for Parke, Davis' Chloromycetin. Portions of Jones' testimony, the witness through whom these exhibits were introduced, were read to the jury (5073a–5074a).

"might well have concluded that the December 1955 Bristol-Pfizer agreement," in which Pfizer licensed Bristol to manufacture and sell tetracycline to the trade and to sell in bulk to Squibb and Upjohn itself "violated the antitrust laws and that Bristol and Pfizer had collaborated in imposing restrictions which otherwise did not exist" (12607a–12608a, 426 F. 2d at 45–46). It also concluded that the instruction improperly referred to the licenses to Squibb and Upjohn as restrictive. Finally, it held that the trial court should have charged specifically that the November 1955 agreements between Bristol and its bulk customers Squibb and Upjohn giving Bristol the exclusive right to settle the patent infringement "could not be considered a part of any conspiracy," and that the issuance of the licenses by Pfizer at Bristol's request "'does not amount to an agreement or understanding by Pfizer with Bristol under which Pfizer promised not to grant manufacturing rights to Upjohn'" (12607a, 426 F. 2d at 45).

A. THE CHARGE WAS EXPLICIT THAT NONE OF THE LICENSING AGREEMENTS WAS IN ITSELF A VIOLATION OF THE SHERMAN ACT.

The following language in the district court's charge, we submit, more than adequately explained to the jury that the patents and licenses and settlements of lawsuits involved in this case were not in themselves violations of the Sherman Act.

> * * * I remind you of my earlier instructions that a patent holder, in the absence of an unlawful agreement or conpiracy, is free to license or refuse to license whomever he wishes. You

should also understand that the mere agreement to cross-license between companies which hold blocking or conflicting patents is not a violation of the antitrust laws. Indeed, such interchange of patent rights in settlement of controversy is often necessary in order to permit technical progress.

In addition, I think it has already been made clear to you that the holder of a patent may license others to make, use or sell the discovery, with such restrictions as may be within the limits of the patent grant. Thus, in the absence of conspiracy, the owner of a patent on a product may license another company to manufacture and use that product solely in the manufacture of some other product. The kind of license you understand that was involved in the Pfizer use of Aureomycin to make tetracycline.

The holder of patent rights has, in other words, a form of lawful monopoly and freedom to exclude others from sharing it. But the patent laws as I have told you, do not authorize him to agree with his licensees that he will exclude or restrict others by refusal or limiting grants under his patent to such other or third parties. Agreements of this kind come within the prohibitions of the antitrust laws rather than the privileges granted by the patent laws.

Now the government does not claim that any of the license agreements involved in this case or indeed any of the written agreements in this case is in itself unlawful or in combination with any of the others, without reference to other facts. Accordingly, you may not infer an antitrust violation merely from the existence of such agreements or from any of the terms con-

tained within them. Your task here is to consider the grants of licenses together with the refusals or absence of such grants to others, in the light of all the testimony and documentary evidence concerning licenses and related problems, in order to determine whether this evidence tends to show the presence of a conspiracy, the absence of a conspiracy, or nothing either way [4965a–4966a].

B. THE DISTRICT COURT'S REFERENCE TO THE SQUIBB AND UPJOHN LICENSES AS RESTRICTED WAS PROPER IN THE CONTEXT OF THE TRIAL.

In describing the agreements among Bristol, Squibb, Upjohn and Pfizer the trial court referred to the licenses to Squibb and Upjohn as "limited" or "restricted." The court of appeals considered this as technically incorrect and misleading (12606a–12608a, 462 F. 2d at 46–47). We submit that the charge, once again, was fair and correct and phrased in terms that were appropriate for the jury to enable it to understand the issue.

What the trial court charged was:

> Now, similar considerations to those I have been stating and repeating apply to the next of the means and methods alleged in the indictment. This charge is as follows:
>
> "Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of tetracycline products."
>
> I have mentioned many times that Pfizer, as part of its rights under its tetracycline patent,

could lawfully issue licenses as it saw fit so long as these licenses and their limitations were given in the exercise of independent business judgment. It was not privileged, however, to agree with a licensee such as Bristol that it would deny or restrict licenses to other competitors such as Squibb and Upjohn.

Accordingly, the vital part of this allegation on the government's theory of the case is the contention that this restriction forbidding manufacture by Squibb and Upjohn was imposed at Bristol's request and as part of an understanding among the parties that Squibb, Upjohn and other potential competitors would be excluded from the grant of tetracycline manufacturing rights.

There is nothing wrongful in itself in the fact that the licenses issued to Squibb and Upjohn were requested by Bristol as part of Bristol's privileges and obligations under its arrangements with Squibb and Upjohn for the settlement of the litigation. The critical inquiry on this score is whether the limitation on Squibb and Upjohn, which barred them from manufacturing, was the particular objective of Bristol and was an agreed objective between Bristol and Pfizer in the issuance of that license [4988a–4989a].

The language of any charge must be tailored to the evidence and terminology of the particular case. The Squibb-Upjohn licenses had been described throughout the trial as "limited" or "restricted" in order to denote the fact that they did not authorize Squibb or Upjohn to manufacture tetracycline or sell it in bulk.

In November of 1955, it will be recalled, Squibb and Upjohn agreed with Bristol not to settle or negotiate directly with Pfizer, and Bristol assumed entire control of the prosecution and defense of the Pfizer litigation. Bristol promised to obtain for Squibb and Upjohn tetracycline licenses "which may, however, *be limited* to your [Squibb's and Upjohn's] right to purchase, use and sell tetracycline to the drug trade * * *" (GX 83, p. 7, 8645a; GX 108, p. 6, 8703a, emphasis added). This was the first reference to a "limited" license for Squibb and Upjohn.

During the trial Schwartz, Bristol's chief executive officer, described the Squibb-Upjohn licenses he arranged as "restricted." Responding to the question whether Upjohn's license permitted it to resell bulk tetracycline it might purchase from "anyone" as bulk rather than in product form (*i.e.*, to the drug trade), Schwartz replied: "No it was *restricted* to the drug trade" (2938a, emphasis added).

In argument before the jury Bristol's own counsel explained the licenses as follows:

> Bristol obtained for Squibb and Upjohn licenses which met the conditions of that agreement you just read—that is, they were licenses which permitted Squibb and Upjohn to purchase, compound, use and sell tetracycline to the drug trade. *Keep in mind you will hear that referred to as a limited license or a restricted license. That term is used in the sense that the license was not as broad as it might have been,* but the license did not limit Squibb and Upjohn with respect to tetracycline bought from Bristol [4740a–4741a, emphasis added].

In referring to the licenses as limited or restricted in the context of this trial and especially in the context of a charge making clear that the licenses were not themselves illegal, the court was properly putting the matter to the jury. To treat this as prejudicial error would improperly limit the trial judge's discretion to explain a case to the jury in non-technical terms it can understand. A reviewing court should not reverse a conviction upon such a hypertechnical reading of the charge.

C. THE DISTRICT JUDGE PROPERLY REFUSED TO CHARGE THAT THE NOVEMBER 1955 AGREEMENTS WERE NOT PART OF ANY CONSPIRACY AND THAT THE ISSUANCE OF THE SQUIBB-UPJOHN LICENSES AT BRISTOL'S REQUEST DID NOT AMOUNT TO AN AGREEMENT TO LIMIT MANUFACTURING RIGHTS.

It was appropriate for the jury to consider the November 1955 agreements, the issuing of the licenses and all the surrounding circumstances in determining whether Bristol, its two bulk customers and Pfizer had a tacit understanding that the manufacture and sale of tetracycline would be confined to the defendants and co-conspirators, as the indictment alleged. The November 1955 agreements, though not illegal on their face, were part of the totality of circumstances bearing on the conspiracy alleged. *United States* v. *General Motors,* 384 U.S. 127, 142, 143; *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809–810; and see *United States* v. *Singer Manufacturing Co.,* 374 U.S. 174, 195. The instructions were specific that the agreements themselves were not illegal: "[the] all-requirements contracts were not un-

lawful when viewed by themselves. They could become unlawful only if they reflected, or tended to effectuate, some agreement or understanding among the companies involved by which they undertook to confine the bulk sales business to Bristol or to exclude other potential competitors and purchasers of bulk from the tetracycline market" (4987a–4988.). See point IV C, below, pp. 83–87.

IV. THE INSTRUCTIONS DID NOT PERMIT THE JURY TO CONVICT BRISTOL FOR ACTS PRIOR TO THE DATE IT WAS ALLEGED TO HAVE ENTERED THE CONSPIRACY.

The court of appeals ruled that the trial court's instructions were prejudicially erroneous because the combined effect of (1) the failure to instruct that Bristol's conduct prior to December 14–15, 1955, could not be considered as proof that Bristol was in any conspiracy and (2) the language in the instructions that the precise dates of the conspiracy need not be proved in order to establish the charges, "could well have caused the jury to believe that Bristol was involved in a conspiracy long before December 14–15, 1955" (12609a–12610a, 426 F. 2d at 47). This ruling does not stand up in the context of the trial.

A. FROM THE OPENING OF THE TRIAL TO ITS CONCLUSION THE COURT AND COUNSEL FOR BOTH SIDES CONTINUALLY BROUGHT HOME TO THE JURY THAT THE GOVERNMENT CLAIMED BRISTOL JOINED THE CONSPIRACY IN DECEMBER 1955 AND NOT BEFORE.

In its preliminary instructions the court advised the jury that while the indictment charged that the conspiracy began in November 1953 and that Pfizer and Cyanamid were in it from its inception, "it is alleged

that the defendant Bristol and two other companies, Squibb and Upjohn, entered the conspiracy later * * * approximately December of 1955 or approximately two years after the alleged inception" (1469a).

The date of Bristol's alleged entry into the conspiracy was mentioned several times during opening statements to the jury by the government (1482a, 1492a) and by Bristol (1550a–1551a, 1563a, 1568a). Throughout the trial, counsel for Bristol repeatedly reminded witnesses, and thereby the jury also, of the fact that Bristol was claimed to have joined the conspiracy in December 1955 (1818a, 1836a, 1841a, 1844a, 1849a–1850a, 2375a, 3043a, 3069a, 3081a–3082a, 4219a, and see 2838a). Indeed, during the cross-examination of Schwartz, Bristol's chief executive officer, counsel for Bristol "put up on the easel a little hand-drawn calendar for the years 1953 through 1957" on which he placed marks corresponding to the dates of certain events Schwartz testified about in order to impress upon the jury that particular events occurred prior to December 1955 when Bristol allegedly joined the conspiracy (3001a, 3010a, 3016a, 3029a–3030a, 3039a). Thus, the jury was constantly kept aware during the trial of the government's claim that Bristol joined the conspiracy in December 1955 and not before.[23]

Government counsel, in his summation, asked the jury to consider Bristol's conduct prior to December

[23] Another instance of such reminders was the government's statement, made at Bristol's request, on the introduction of documents relating to proceedings before the patent office, that with three exceptions they all "relate to matters before December 1955" (2273a–2276a, 2252a–2254a, 2263a).

phasize that conduct in presenting evidence and in argument. Indeed, Bristol never requested that the jury be told, as the court of appeals would require, that it could not consider Bristol's pre-December 1955 conduct "as proof of Bristol's being in any conspiracy" (12610a; 426 F. 2d at 47). Such an instruction would have been inconsistent with Bristol's argument in summation that the jury should consider Bristol's total conduct, both before and after it was charged with joining the conspiracy, in deciding whether the offenses charged had been established (4744a).

The court of appeals further held that the instructions were prejudicially erroneous because they failed to explain the significance of the fact that Bristol's pre-conspiracy conduct continued to be substantially the same after the date it allegedly entered the conspiracy.[34]

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[34] The court of appeals' initial opinion stated (12610a; 426 F. 2d at 47), referring to Bristol's conduct prior to December, 1955:

> A comprehensive charge as to these prior events became all the more important because the government, in effect, had put its stamp of legality on identity of price and restricted bulk sales. It was thus incumbent on the government to prove beyond a reasonable doubt by some reverse alchemistic process that acts which had been legal had by some action taken at the December 14–15 meetings been changed merely by continuance into acts thereafter illegal.
>
> * * * [F]ailure to differentiate between the legal and the illegal was prejudicial error.

In its subsequent opinion denying rehearing the court, without actually ruling on the point, "incline[d]" to the view that the evidence was insufficient to warrant submission to the jury of the issue whether Bristol joined a conspiracy to exclude (12619a).

But the inference Bristol sought to have the jury draw—that it did not conspire because it did not change its marketing practices after the date on which the prosecution charged it with conspiring—was not the only permissible inference that could be drawn from Bristol's pre-conspiracy conduct. It was equally open to the jury to draw the inference that the McKeen-Schwartz meetings of December 14–15, 1955, resulted in a tacit understanding that Bristol's pre-meeting prices and practices would continue unchanged thereafter. That is, the jury could find that each party to the Bristol-Pfizer agreement understood that the settlement agreement would assure that there would be no change in existing marketing relationships; that after the agreement Bristol, Pfizer and Cyanamid would be the only manufacturers of tetracycline; that Bristol would be the only seller of bulk tetracycline; that it would continue to supply only Squibb and Upjohn with bulk tetracycline and that the prices of the broad spectrum antibiotic products sold by the five co-conspirators would remain unchanged. The "reverse alchemistic process" (12610a, 420 F. 2d at 47), to use the court of appeals' words, by which Bristol's conduct became illegal after December 14–15, 1955, was that its subsequent conduct was not the result of independent business judgment, as its previous conduct had been, but was done pursuant to or in effectuation of the tacit understanding the jury was entitled to find existed when Bristol and Pfizer settled their differences on December 14–15, 1955.

The trial court's instructions made this perfectly clear. The instructions stressed that a "basic and essential element" of the crimes alleged was the existence of a conspiracy, "a mutual agreement or understanding that [two or more persons] will act together for an unlawful purpose" (4950a-4951a). While the "central requirement of an 'agreement'" could be shown by the course of conduct pursued by the parties, the instructions said that "it is the government's burden to show acquiescence and participation [in the illegal scheme] as a matter of conscious choice beyond a reasonable doubt" (4952a). Uniform or mutually beneficial conduct would not be sufficient to establish a conspiracy, the instructions continued (*ibid.*), because

> If such actions were taken independently as a matter of individual business judgment, without any agreement or arrangement or understanding among the parties, then there would be no conspiracy, even though the separate actions were substantially concurrent and tended toward the accomplishment of similar objectives separately pursued by the individual companies.

The significance of any party's conduct changing or remaining the same after the meetings at which the government alleged the conspiracy was initiated or joined was properly left to the jury's determination. After reminding the jury that the "government places the inception of the alleged conspiracy between Pfizer and Cyanamid at the meetings and negotiations of November 1953," and that "the alleged entry of Bris-

tol into the conspiracy, along with Squibb and Upjohn, is dated from the time of the meetings between Schwartz and McKeen and others on December 14 and 15, 1955" (4999a), the instructions turned to the subject of meetings. They cautioned the jury that while proof of "face-to-face meetings" was not required to prove a conspiracy, and while meetings may provide "an opportunity to make either lawful or unlawful agreements," nevertheless "evidence of such meetings could not in itself establish the existence of any unlawful conspiracy" (5000a). "In weighing the significance and meaning of the meetings in this case," the jury was directed to consider various factors, including comparisons between conduct before and after the meetings (*ibid.*):

> [Y]ou will consider the extent to which you have heard legitimate business purposes for [the meetings], the events that came before, and the events that came after, the extent to which the conduct of any of the companies involved remained the same or changed in the times preceding and following such meetings, the public or private statements the parties may have made touching the subject matter of their meetings—and, as usual, and still important, all the surrounding circumstances.

Thus, the instructions correctly set forth the legal principles that were to control the jury's consideration of the evidence placed before it, but properly left the jury free to draw from the evidence the inferences that it thought most appropriate.

CONCLUSION

This case is not concerned with a minor or technical breach of the law. It concerns a major exercise of concerted power detrimental to the public interest by a group of firms in an industry whose proper functioning is vital to the nation. It concerns a striking example of static and uncompetitive pricing to the great profit of respondents and corresponding expense of the public. Though the techniques may be more subtle than in 1890, the result is what the Sherman Act was intended to guard against.

The case does not concern temporary, or accidental, parallel pricing, or pricing dictated by the cost of the product or expectable in the particular market. The defendants rigidly held their prices although there had previously been competition in the same market, although important new products were being marketed as to which price competition could be expected, although costs left full room for maneuvering and despite fluctuation in market shares to the detriment of efficient producers and the benefit of higher cost producers. That the pricing would continue so static so long under such circumstances is strong evidence of an agreement or understanding between the defendants that they would not compete with one another. *Interstate Circuit* v. *United States*, 306 U.S. 208.

The defendants cooperated with each other in obtaining a patent monopoly, and two of the defendants made misrepresentations to the patent examiner to ob-

tain a patent on a drug that might well have been in the public domain without the misrepresentation. The misuse of the patent system in an attempt to monopolize was flagrant. See *Charles Pfizer & Co.* v. *Federal Trade Commission,* 401 F. 2d 574 (C.A. 6).

The real question in this case is whether in a large criminal antitrust trial, the record shall be combed after the event and the judgment reversed for whatever errors can be found. It is almost inevitable that an appellate court will find better ways to handle situations in retrospect and that some genuine errors will find their way into such a large and complicated record.

The case against respondents was a strong one. The evidence in this case fully justified the conclusion that respondents had an agreement, as that term is used in Sherman Act cases, that they would not compete as to price in the broad spectrum antibiotic market, nor allow others to enter the market. Their actions spoke louder than any words. The jury, after a full trial, with extensive evidence, and issues fully presented, so held. Its decision should be sustained.

A tacit agreement is, necessarily, something that is capable of proof only by circumstantial evidence. Agreements which run afoul of the antitrust laws rarely will be memorialized in written instruments. And where circumstances permit, it may even be unnecessary for parties to particular business transactions to discuss among themselves the elements of a tacit understanding which might form the basis underlying those transactions.[2]

[2] *E. g., American Tobacco Co.* v. *United States,* 328 U.S. 781.

In terms of the kinds of proof which can reasonably be expected to be available to the prosecution in cases of this nature, the evidence of guilt in this case is substantial. If the court of appeals' reversal in this case is permitted to stand on the theory that because the case was "close" slight errors in the trial might have had a decisive impact on the jury, then given the nature and magnitude of the errors the court of appeals thought sufficient to warrant reversal here, the prosecution of major Sherman Act violations will be seriously impaired, as will the deterrent effect that the threat of criminal prosecution was designed to have on potential violators. Antitrust cases are inherently long and complex. Astute defense counsel will always be able to find putative errors or matters that could have been handled another way. The enforcement of laws designed to preserve free competition and free entrance into markets and honest business dealings deserves more hospitable treatment.

There was a time when "courts of review 'tower[ed] above the trials of criminal cases as impregnable citadels of technicality.' So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been * * * obtained." *Kotteakos* v. *United States*, 328 U.S. 750, 759. Rule 52(a) of the Federal Rules of Criminal Procedure restates 28 U.S.C. 2111, which was designed to prevent this: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

This is not a case involving a violation of basic constitutional rights which might prevent a finding of harmless error. Compare *Chapman* v. *California*, 386 U.S. 18, 23. Nor is it one in which a person's life is at stake and the slightest error might be considered harmful. "The character of the proceeding and what is at stake upon its outcome are material factors in deciding whether an error requires reversal." 3 Wright, *Federal Practice and Procedure, Criminal*, 368; *Kotteakos* v. *United States*, 328 U.S. 750, 762.

"A defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States*, 344 U.S. 604, 619." This is especially true where the case is long and complex, the defendants are fully and effectively represented and the atmosphere of the trial orderly and fair. A review of the entire record in this case reveals that respondents were fairly convicted after a trial in which they were vigorously and well represented by, as the district court put it (281 F. Supp. at 841), "[d]istinguished, astute and numerous * * * counsel." The instructions taken as a whole and as part of the lengthy and complex trial which they culminated fully and fairly submitted to the jury the issue whether respondents were guilty of the crimes alleged. As the Second Circuit observed in *United States* v. *Antonelli Fireworks Co.*, also a lengthy corporate conspiracy case (155 F. 2d 631, 641–642, certiorari denied, 329 U.S. 742):

" "[J]ustice, though due to the accused, is due to the accuser also." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122.

> In the review of a criminal conviction after a long and bitterly fought trial, there is considerable incentive for reviewing judges to order reversal. It is comparatively easy to single out particular instances, which, apart from their setting in the total trial, may afford a dramatic basis for appeal to the American spirit of fair play and cherished love of personal liberty. Such an opinion writes itself, chances of reversal and reinstatement of the verdict are remote, and academic acclaim is assured. But there is a demand for what Wigmore (Evidence, 3d Ed. 1940, § 21) calls "the solid claims of law and order"; and a failure to visit with the moderate punishment here involved serious defrauding of the government in its war effort is unjust to other honest manufacturers and unfair to the endeavors of all others engaged in a common patriotic enterprise. Even an order for a new trial, and the direction to begin the work of prosecution anew, is deadening to the morale of those who have already spent years in developing a case justifying a jury verdict. Of course, we must be acutely sensitive to errors affecting human rights and freedom; but there is an equal demand that the law should have its way when a long and fair trial has proceeded to its natural conclusion. * * *

This case should not be retried. It was tried fairly. There is no reason to believe that a new trial would be any closer to perfect. A remand of such a case is an unnecessary additional expense to the government and the defendants and an invitation to other companies to risk violations of antitrust laws. Defendants

had their full day in court. A jury found them guilty. This finding, after a full, hard fought and fair trial should not be set aside.

Accordingly, the judgment of the court of appeals should be reversed and the case should be remanded to that court for further proceedings consistent with this Court's opinion.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-72

UNITED STATES OF AMERICA,
Petitioner,

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, AND BRISTOL-MYERS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT AMERICAN CYANAMID COMPANY

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IN THE

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No. 70-72

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v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, AND BRISTOL-MYERS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT AMERICAN CYANAMID COMPANY

PRELIMINARY STATEMENT

The defendants-respondents here have been under attack in judicial, administrative, legislative, and media contexts for nearly a score of years.* Surely, if there were issues now deserving this Court's attention, the contending parties should be able to agree on the questions presented for review. This minimal plateau has not been achieved.

* Basic dates are in the record (463a-562a).

QUESTION PRESENTED FOR REVIEW

Respondent American Cyanamid Company ("Cyanamid") respectfully submits that the only question presented for review is:

> Did the court of appeals for the Second Circuit err in its factual conclusion, based upon an intensive study of a record of 12,583 printed pages, that the trial errors which it found, ". . . when taken as a whole, were sufficient to deprive the defendants of a fair trial." (Joint Appendix at 12618a, 437 F.2d at 958).*

The petitioner seeks to avoid meeting this basic question posed by the court of appeals' opinion. It advances narrowly circumscribed issues predicated upon the assumption that the court of appeals reversed for particularized errors in the trial court's charge to the jury considered in isolation. Put bluntly, the petitioner asks this Court either to disregard or to disbelieve the explicit statements of the court of appeals that its decision rested upon a consideration of the whole of the charge and the entire record (12598a, 12611a, 426 F.2d at 41, 48).

Cyanamid's brief will deal with the various points urged by the petitioner, but it will do so on the level of what the court of appeals actually did and decided, rather than within an artificial framework devised from an unjustifiably fragmented analysis.

---

* The Second Circuit's initial opinion is reported at 426 F.2d 32; its opinion denying the government's petition for rehearing is reported at 437 F.2d 957. Both opinions appear in the Joint Appendix, the first at 12585a, the second at 12617a. Citation to the Joint Appendix hereinafter will be by page reference only.

COUNTER STATEMENT

The court of appeals' factual summary is thorough and is not attacked by petitioner.

The opinion of the court of appeals sets forth in approximately ten pages what that court describes as a "highly selective" condensation of the voluminous record, "concentrating on the determinative facts" (12586a-94a, 426 F.2d at 33-38). The petitioner's 25-page "statement of the case" in its brief (herein cited as "Br.") nowhere challenges the accuracy of the court's synopsis.

Cyanamid concurs in the view of the court of appeals that its summary outlines the determinative facts, which were essentially undisputed (12587a, 426 F.2d at 34). To avoid burdening the Court with repetition, therefore, Cyanamid will rely primarily on the opinion of the court of appeals for the factual background.

By way of added counter statement, Cyanamid refers only to facts supporting two important conclusions of the court of appeals: (1) the "closeness" of the case; and (2) the particularly inflammatory nature of the issue of "unreasonably high" prices and profits, as aggravated by the aura of prejudicial publicity before and during the trial.

The court of appeals' appraisal of the case as a "close" one.

In the conclusion to its brief, the petitioner protests categorically that the "case against respondents was a strong one" (Br. at 89). The court of appeals, however, concluded that "... it would indeed be difficult for an appellate court to say that these items [the cumulative errors] may not have affected the jurors' votes in a criminal case so close as this" (12618a, 437 F.2d at 959); and further

expressed its inclination to the view that ". . . there was insufficient evidence to warrant submission to the jury of the issue whether [Bristol] had conspired with Pfizer and Cyanamid to exclude others from the tetracycline market" (12619a, 437 F.2d at 959). Affirmation of the strength of the prosecution's case cannot draw support even from the dissent, which dignified its evidence with no higher accolade than that it "is not overwhelming" (12611a, 426 F.2d at 48).

Guilt in this case is argued as an inference sought to be drawn from circumstantial evidence, resting "almost entirely upon oral and written statements from defendants themselves. Because of this circumstance, the facts may be said to be virtually undisputed" (12587a, 426 F.2d at 34). No contract was claimed to be unlawful without reference to other facts (280a, 4865a, 4966a, 12590a, 426 F.2d at 36); no patent was asserted to be invalid (274a, 293a);* no witness gave testimony inconsistent with unilateral action in pursuance of the legitimate commercial interests of his company (12587a, 12590a, 426 F.2d at 34, 36). As the court of appeals said, the entire trial revealed a case ". . . wholly dependent for conviction upon the jury's drawing of inferences in direct contrast to the statements of the witnesses present and the documents evidencing their agreement[s]" (12610a, 426 F.2d at 47). This statement related specifically to Bristol and Pfizer, but is applicable equally to the whole record. The court of appeals correctly evaluated this as a "close" case.

Charges substantially similar to those made here were presented by the complaint in the Federal Trade Commission case, *Matter of American Cyanamid et al.*, FTC Docket 7211 ("the FTC case"), filed in 1958. The eventual result of the FTC case confirms the court of appeals' evaluation of this case.

* The cited reference is to the bill of particulars and relates to the Pfizer tetracycline patent. While other patent files were in evidence, the petitioner did not question the validity of any of the patents.

Shortly after the indictment in this case in August 1961, the FTC Hearing Examiner who had conducted an extensive trial issued a 195-page Initial Decision dealing with the evidence in great detail and absolving the defendants of all charges. 1961-63 Transfer Binder Trade Reg. Rep. ¶ 15,537 (FTC 1961). These included charges of conspiracy to exclude others and to fix prices, which are essentially the charges of the indictment.

The Initial Decision, as to the part of the result dismissing the charges of conspiracy to exclude others, was affirmed by the Commission in 1963. 63 FTC 1747, 1862-64 (1963). The Commission at this point reversed the Hearing Examiner's conclusion that a price conspiracy had not been established, but this decision was vacated by the Sixth Circuit on the ground that the Commission's Chairman was disqualified. 363 F.2d 757 (6th Cir. 1966). After remand, the Commission dismissed the charges of a price fixing conspiracy by a 2-2 vote. 1967-70 Transfer Binder Trade Reg. Rep., ¶ 18,077 (1967).*

The nature of the jury's deliberations at the trial of this case indicates that it found the issues difficult and probably puzzling. The deliberations extended over a period of two days, including part of the night of each. The jury asked that parts of the evidence be given to it (5071a). As shown hereafter in the argument (pp. 37-38, *infra*), the last request was for some items of evidence relating to Parke, Davis which were favorable to the defense but with which, as the court of appeals held, the trial judge's instructions had dealt in a manner calculated to mislead the jury into disregarding the evidence.

The court of appeals did not impulsively reach the conclusion that the errors in the record compelled reversal. After the argument it considered the case for an overall period

* The Commission found that certain separate actions of Pfizer and Cyanamid amounted to unfair competition violating § 5 of the FTC Act, and this was affirmed on a second review by the Sixth Circuit (401 F.2d 594 (6th Cir. 1968)).

of some 18 months. The initial opinions of the panel which heard the argument were not handed down for more than 11 months. The court of appeals pinpointed the strategy followed by the prosecution:

> "Probably, of necessity, the government virtually had to ignore or at least play down the business reasons asserted by the defendants' executives as motivating their agreements and the actions taken by them and to concentrate on the possibly more jury appealing aspects such as abnormally high prices and profits and patent fraud.
>
> . . . But as the case was submitted to the jury, [the 'primary issue' of conspiracy] was subordinated in government summation and the charge to the more inflammatory issues of illegally exorbitant prices charged a victimized public and patent fraud." (12611a, 426 F.2d at 48. *See also* 12602a, 426 F.2d at 43).

The court concluded:

> "A review of the entire record leads to the conclusion that the judgments of conviction . . . must be reversed . . ." (12611a, 426 F.2d at 48).

A further indication that the case is at least a "close" one appears in an opinion of Judge Inzer B. Wyatt of the Southern District of New York, approving a settlement of certain damage cases brought against the respondents in which the complaints made allegations similar to those made in the FTC case and the indictment. He evaluated the probabilities of the plaintiffs' success, and stated that he had examined the record on appeal of the FTC case in the Sixth Circuit and the record of this case in the Second Circuit. His conclusion, based on "careful study of those records" was that "the chances of recovery in any of these cases are no better than 50-50 and probably should more realistically be called slight." *State of West Virginia* v. *Chas. Pfizer & Co., Inc. et al.*, 314 F.Supp. 710, 741 (SDNY 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971), *cert. den.* U.S. (1971).

Prejudicial publicity before and during the trial which enhanced the inflammatory nature of the issue of "unreasonably high" prices and profits.

In testing the court of appeals' appraisal of the record as a whole, the trial court's actions and omissions must be considered in the setting in which they occurred. A material aspect of that setting was the publicity against the background of which the trial was held.* The context is amply documented in the record (309a-17a, 5502a-29a, 5609a-29a, 5635a-6330a), which shows that the court of appeals was fully justified in referring to the matter of alleged "unreasonably high" prices and profits as "inflammatory" (12602a, 12611a; 426 F.2d at 43, 48). The trial court repeatedly was advised of this publicity and was urged to exercise appropriate care to avoid its improperly influencing the jury (308a-13a, 852a-53a, 997a-1005a, 1265a-68a, 6648a).

During 1959 and 1960 the Subcommittee on Antitrust and Monopoly of the United States Senate conducted a widely publicized series of hearings concerning the prescription drug industry. From the transcript of these hearings and the report of the Subcommittee issued after the hearings, it appears that a major effort was made to show that the prices of prescription drugs were unreasonably high and that their manufacturers were profiteers (309a, and citations there stated). In the ensuing years, the communications media channeled to the public in New York and elsewhere a barrage of publicity critical of, and tending to excite prejudice against, the pharmaceutical industry. While

* With the exception of the slant given to a press release at the time of indictment, mentioned hereafter, the defendants have not taken the position that the publicity was stimulated by counsel responsible for the prosecution. Government counsel so represented to the trial court and defense counsel so assumed (4935a).

the grand jury was in session in 1960, these specific defendants were under attack with respect to their antibiotic products (310a). Facsimile samples of such attacks are in the record (5657a-6137a).

Throughout the period, the technique was employed (as by the petitioner in the trial below) of comparing bare factory production cost of a drug with its ultimate selling price, and ignoring all administration, sales, research and other costs incident to the operation of the business. The thrust of the news approach may be illustrated by typical headlines:

> "Reveal 1,118% Drug Markup" (5662a). "Senate Prober Reveals 1,000% Drug Markup" (5657a). "10,000 Pct. Drug Markup Charged" (5685a). "Drug Gouge Put at $750 Million" (5679a). "Estes Reports on Drug Probe's 1st Round:
> Prices Too, Too High" (5683a).

Not surprisingly, the infection appears to have reached the author of the Department of Justice press release on August 17, 1961, which stated that Cyanamid and the other defendants had been indicted "on charges of maintaining unreasonably high and non-competitive prices and monopolizing the production and distribution of the drugs since November, 1953" (314a). Not until the ninth paragraph did the Department of Justice release even mention the accusation of "conspiracy." A press release from Senator Kefauver on the same date referred only to "the exorbitant price" of pharmaceuticals, and did not employ the word "conspiracy" (317a). The press releases bore foreseeable fruit. In stories appearing in each of eight New York City newspapers on August 18, 1971, references were made to allegations of "unreasonably high" prices or profits or both (311a).

Adverse criticism of the drug industry again received special stimulus just before and during the trial. The

Monopoly Subcommittee of the Senate Select Committee on Small Business initiated in 1967 a series of widely publicized hearings on drug pricing. The Committee rejected the communicated concern of defense counsel that such hearings would make a fair trial difficult, and spurned the suggestion that the hearings be deferred to avoid prejudice (5643a-45a, 5650a-55a).

Much publicity was given to charges made at these 1967 hearings that drug prices were excessive and pricing practices improper. Stories appeared in newspapers and magazines (*e.g.*, 5516a-21a, 5609a-27a, 5629a, 6088a, 6096a, 6114a). Radio and television contributed their facilities (*e.g.*, WNBC, April 19, 1967, 8:05 p.m., 6142a; WPAT, May 15, 1967, 4:30 p.m., 6086a, witness "accused the industry of conspiring to keep prices high . . ."; WNBC/TV, May 15, 1967, 6:00 p.m., 6106a).

On October 9, 1967, two weeks before the trial began, the head of the Food and Drug Administration and the chairman of the Federal Trade Commission, appearing on the NBC Today Show, expressed views indicating belief that drug prices and profits were too high, and that there was an alleged absence of competition (5504a, transcript at 5510a). On November 18, 1967 the "pharmaceutical houses" were cartooned as injecting high price drugs through promotion and propaganda into the arms of doctors and patients, under a pun caption, "The Drugging Industry" (5280a).

On December 14, 1967, on the eve of the day that the jury was to return after a seven-day recess following the completion of the petitioner's case, the Subcommittee called George R. Squibb, a former executive of the alleged co-conspirator, E. R. Squibb & Sons, and promptly issued a press release on Squibb's testimony which release constituted an all-out, inflammatory attack on the pricing policies of the drug industry (5505a, transcript at 5516a-17a). Reports of this testimony were broadcast on the various

New York radio and television stations on December 14, 1967. Transcripts of some of these broadcasts are in the record (NBC, 5621a; CBS, 5518a, 5617a, 5618a, 5622a; WNEW, 5519a; WQXR, 5620a; WABC, 5623a, 5624a).

Newspaper publicity included a story in the New York Times of December 15, 1967 referring to George Squibb as having urged reductions in drug prices and having spoken of "exploitation of medicines" and "wasteful" research (5520a). On the same day the New York Daily News stated that Mr. Squibb had testified that the public would be paying less for drugs if pharmaceutical manufacturers were less "greedy," and referred to markups of "nine or 12 or 20 times factory cost" (5521a).

In the following eleven days, while the jurors were at liberty as the court worked on its charge, the attacks continued. On December 19, 1967 the New York Post headline was "Senators Told Drug Biz Juggles Prices" (copy, 5611a). On December 20, the Daily News headline was "Second Study Confirms Overcharging on Drugs" (5612a). On December 21, a headline "The Drug Profiteers (Contd.)" appeared (5626a). Christmas day was marked by the report of a Christmas eve attack by Senator Nelson on drug prices for cities (New York Times, 5627a).

The jury returned to court on December 26, 1967 to hear the final arguments. While they were in progress the New York Post on December 27th published a Herblock cartoon depicting the pharmaceutical houses as obese profiteers shaking excessive prices from the public (5629a).

On the date of its publication, which was the day of the government's closing argument, the cartoon was brought to the trial court's attention. At that time reconsideration of a motion to dismiss the indictment previously made was asked, and alternatively the court was asked to reconsider and grant a motion to strike the evidence as to costs and profits and instruct the jury to disregard that subject

(4924a). The motions were not granted. The next day (December 28, 1967) the trial judge devoted a great deal of attention to prices and profits in his instructions, and specifically told the jury that the reasonableness of prices was in issue, and that if the jury found prices were unreasonable it might consider this as evidence of conspiracy.

SUMMARY OF ARGUMENT

This is an antitrust case, but it is also a criminal case. It does not "impede" the proper and effective enforcement of the antitrust laws to insist that prosecutors and trial courts be required, under peril of reversal, to accord to defendants a fair trial: the minimum right of any indicted defendant under our system of laws. It does not impose any inappropriate burden on the prosecutor or the court to require that the charge to the jury in a complex case shall be fair and balanced, and shall not be such, on the record as a whole, as to tend to mislead the jury or divert it from the true issues. The government concedes that in this trial there occurred what it calls "genuine errors" (Br. p. 89). No verdict resulting from a court room encounter in which the cumulative effect of genuine errors is to deprive the defendant of a fair trial can be allowed to stand. The court of appeals' decision accords with these precepts. This Court should leave no doubt that they apply to over-zealous prosecution in antitrust cases as they do in any other criminal case.

I. The court of appeals concluded that the errors occurring during the trial of this case, considered separately and cumulatively, were of such a prejudicial nature as to deprive the defendants of their right to a fair trial. While the petitioner recognizes that "genuine errors" occurred, it asserts that they were "harmless."

The settled test for determining whether an admitted error in a criminal case should be deemed to require reversal or should be disregarded as "harmless" calls for the appellate court to determine whether there is a reasonable possibility that it may have contributed to the conviction. Applying this test here, the court of appeals rejected the petitioner's contention. It performed ably, fully, conscientiously and exhaustively the role which is assigned to it in our judicial system. No issue presented justifies the Supreme Court's now retracing this meticulous factual evaluation. The Court accordingly should dismiss the writ of certiorari as improvidently granted.

II. This case was tried against a background of years of emotional accusations that the defendants' prices and profits were "unreasonably high." There was no direct evidence of conspiracy and the only direct evidence was that there was no conspiracy. The prosecution's reliance was on circumstantial evidence, the most prejudicial of which related to the claim that prices were "unreasonably high." The trial court instructed the jury that a finding of unreasonable prices would constitute evidence of conspiracy. Under the facts of this case, a finding that prices were unreasonable might and probably would be the determining factor in the jury's decision on the basic question of conspiracy. This Court has rejected a construction of the Sherman Act "making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable * * *" 273 U. S. 397, 398.

III. The petitioner's brief argues the identity of published prices to certain classes of customers—primarily wholesalers and retailers—as a basis for an inference of conspiracy. The trial court's charge devoted substantial space to these charges of price stability.

Under accepted economic principles, in an oligopoly situation such as existed here, price uniformity and stability are normal rather than abnormal. The applicability of this principle is to be seen in the evidence regarding prices under admittedly non-conspiratorial conditions. The same pricing policies as those prevailing during the period of the claimed conspiracy were followed, (i) at all times by Parke, Davis, an admitted non-conspirator, (ii) by Pfizer and Cyanamid during a period of years before the claimed formation of the alleged conspiracy, and (iii) by Bristol, Squibb and Upjohn during a period of nearly two years before they were claimed to have joined the alleged conspiracy. These facts, indicating that the price behavior was consistent with unilateral action, reinforced extensive testimony of defendants' officials that their decisions had been independent. The trial judge erred in not pointing out such facts, while stressing price stability as circumstantial evidence of conspiracy.

IV. The trial judge's treatment of the evidence relating to the conduct of a non-defendant and conceded non-conspirator, Parke, Davis, which paralleled that of the defendants, as the court of appeals said, "alone might have prejudiced the jury's judgment." The trial court erroneously limited the arguments of defense counsel relating to Parke, Davis; refused to give requested instructions which would have pointed out the probative weight of the evidence of Parke, Davis' conduct on the issue of the innocence of the defendants; and gave instructions which destroyed the value of the evidence to the defense.

V. In view of the theory of the prosecution that the alleged conspiracy was initiated and subsequently expanded by the principal officers of defendants at identified and specified meetings, and that inferences of what happened at these meetings might be drawn from the subse-

quent market behavior of the drug tetracycline, the testimony of the officers was of vital importance to the defense. The court of appeals correctly held that the charge to the jury "slighted and rather deprecated the testimony." The instructions described the witnesses as having denied guilt "in broad terms" when their testimony in fact was detailed and specific; incorrectly suggested that there was inconsistency between the testimony and the earlier conduct of the defendants and officials; erroneously implied that the witnesses had said merely that they had not "believed" they had violated the law; and confusingly referred to "assertions of innocence" as involving legal as well as factual contentions.

VI. The court of appeals correctly held that the court's charge to the jury overemphasized the claims and evidence relating to alleged fraud on the Patent Office, diverting the jury from the real issue of conspiracy. As in the case of the overemphasis on the accusation that prices and profits were "unreasonably high," the effect of the treatment of the evidence relating to the patent applications was to represent the defendants as evil, and to deflect the jurors from the true issue of conspiracy.

VII. The cumulative effect of the various errors materially enhanced their prejudicial effect on the defendants. The court of appeals correctly concluded that the errors had such an interrelation that their effect was to deprive the defendants of a fair trial.

VIII. The sufficiency of the evidence to support the verdict is not the issue here, but the closeness of the case is a factor to be considered in determining whether the errors denied the defendants a fair trial. In a case where the scales are closely balanced, it is especially important that the trial be conducted with scrupulous care. The possibility

that an error will affect the verdict is increased in such a case, and correspondingly the range of "genuine error" which properly may be disregarded as "harmless" is narrow. From the prosecution's standpoint, the present case was at most a close one, and the effect of the errors was to deny the defendants a fair trial.

IX. The court of appeals stated that it had not passed upon a number of defense contentions. It made clear that it had not rejected those contentions. An important example was its statement that upon considering the petition for rehearing it was inclined to the view that there had been insufficient evidence to warrant submission to the jury of the issue whether Bristol conspired with Pfizer and Cyanamid to exclude others from the tetracycline market. A charge to the jury corrected in this vital respect would alter materially the thrust of the accusations against Cyanamid and would affect significantly both summations and jury deliberations. If all else were ignored, this alone would compel the reversal which the court of appeals ordered.

ARGUMENT

I.

The case appropriately may be disposed of by dismissal of the writ of certiorari as improvidently granted.

The substance of the petitioner's position (Br. at 36-38, 88-93) is that the conceded "genuine errors" of the trial should be classified as "harmless." In support of this argument, petitioner quotes (Br. at 91) a sentence from *Lutwak v. United States*, 344 U. S. 604, 619, for the thesis that a defendant is not entitled to a "perfect" trial. The first part of this sentence, however, states that a defendant is entitled to a "fair trial."

The court of appeals devoted months of labor to its decision in a case in which its opinions present no questions of precedential importance (12619a, 437 F.2d at 959).* The two opinions make clear that the reversal stemmed from the court's thoroughly considered judgment, on the entire record, that the errors were of such a prejudicial nature as to deny to the defendants a fair trial. A court of review has the duty first to identify errors and then to determine whether they can be disregarded as harmless. In the present case the dissenting judge did not exclude errors; he thought them harmless, but the majority found errors so fraught with prejudicial tendency as to demand reversal. Where a court of appeals thus has conscientiously performed its assigned role, this Court normally should not expend its time in duplicative review.**

The petitioner urges that in criminal antitrust cases, appellate courts should not "comb" the record for errors (Br. at 32, 89). The "combing" here consisted of the court's considering the defendants' complaints of matters which first and fruitlessly were called to the attention of the trial court. When the petitioner's "combing" assertions are linked with its further statements to the effect that if the reversal by the court of appeals be allowed to stand the prosecution of major Sherman Act violations will be seriously impaired (Br. at 90), and that basic constitutional rights or life are not at stake (Br. at 91), the argument comes alarmingly close to an assertion that defendants in criminal antitrust trials, at least where only corporations are charged, are not entitled to a fair trial and that errors seldom, if ever,

* The petitioner virtually admitted this in the petition for certiorari (Pet. Cert. at 13).

** The Court has criticized the provision of the Expediting Act of 1903 for committing to it the direct review of district court decisions in civil government antitrust cases, on the ground that it requires the Supreme Court to perform the functions of a court of appeals. *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 355 (1962); *United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 175n. 1 (1963).

can be harmful. This Court has never taken the view, however, that the rights of defendants are less in criminal antitrust cases than in other criminal cases. *Cf. National Dairy Products Corp.* v. *United States,* 384 U. S. 883 (1966) and *Dennis* v. *United States,* 384 U. S. 855 (1966).

In any criminal case the test of whether errors are harmless must be whether there is a reasonable possibility that they may have contributed to the conviction. Applying this test, the court of appeals rejected the petitioner's contention that the errors were harmless. In the light of the careful review which preceded and led to this conclusion, and since no questions of substance which could affect other cases are involved, the Court should dismiss the writ of certiorari as improvidently granted.*

This suggestion is wholly appropriate in view of the narrow approach to the record which characterized the petition for certiorari and which gave this Court an opportunity for only a limited appreciation of the history of the case; and of the Court's present access to the full record, permitting it to appraise the "totality of circumstances as the record makes them manifest." *Bullock* v. *South Carolina,* 365 U. S. 292 (1961). There is nothing extraordinary in concluding in such a situation that a case does not merit the plenary review which the Court, on the basis of the petition, initially through might be indicated. *Baldonado* v. *California,* 366 U. S. 417 (1961).

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* Alternatively, the Court should summarily affirm the judgment of the court of appeals without reviewing the entire record. District court decisions have been summarily affirmed even in civil antitrust cases where by reason of the Expediting Act there is no intermediate appellate review. *Kennecott Copper Corp.* v. *United States,* 381 U. S. 414 (1965); *Columbia Artists Management, Inc.* v. *United States,* 381 U. S. 348 (1965).

II.

The excessive emphasis in the trial on the charge that prices and profits were "unreasonably high," and the trial court's treatment of the evidence relating to this charge, denied the defendants a fair trial.

A. Structure of the accusation.

The indictment (24a-41a) charged, in three counts, a conspiracy to fix prices and to exclude competition in the broad spectrum antibiotic market composed of Aureomycin, Terramycin, Chloromycetin, and tetracycline. One of the "substantial terms" alleged in Count One was that:

> "(d) The sale of broad spectrum antibiotic Products by the defendant companies and the co-conspirator companies be at substantially identical and non-competitive prices" (33a).

This allegation, repeated by adoption in Count Two, does not raise the issue of "reasonableness" of prices or profits.

The "means and methods" allegations posed a different accusation. These were common to all three counts (33a-35a, 38a, 40a). They alleged in part:

> (a) As to the period when no claim of conspiracy between any of the defendants is made, *i.e.*, pre-November, 1953:
>
> That "Pfizer and Cyanamid maintained substantially identical, non-competitive and *unreasonably high* prices on Terramycin Products and Aureomycin Products, respectively" (35a, ¶ 46(j), emphasis added).
>
> (b) As to the period when no claim of conspiracy as to Bristol is made, *i.e.*, November 1953-December 1955; and also
>
> (c) As to the period shortly before and shortly after the alleged conspiracy is claimed to have been formed, *i.e.*, November, 1953:

> That "Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its Tetracycline Products on the market at prices which were substantially identical with each other and which conformed to the non-competitive prices of Terramycin Products and Aureomycin Products in effect as of November 1953, and all these companies maintained such substantially identical, non-competitive and *unreasonably high* prices until at least July 1960" (35a, ¶ 46(k), emphasis added).

The "background" allegations of the indictment stated that as of November 1953 Pfizer and Cyanamid were making "unreasonably high" profits (32a, ¶ 42). As "effects" of the claimed conspiracy, it was also alleged that the defendants made "unreasonably high" profits (36a, ¶ 49(d), (e)).*

It was undisputed, as the court of appeals observed, that "[t]here had been price stability between aureomycin, terramycin and chloromycetin for several years prior to the alleged conspiracy" (12588a, 426 F.2d at 35). Between 1949 and 1951 each of four general price reductions (totalling about 65%) had been met promptly by the other sellers (2746a-48a, 6757a, 6837a). From 1951 to 1953 there were no reductions. Cyanamid brought tetracycline to the market in November 1953 at prices equalling those then prevailing for equivalent dosages of the other three broad spectrums (6736a-52a). Pfizer met this market price when it introduced its tetracycline (6765a-70a). In the ensuing period, when they were not claimed to be conspirators, Bristol, Squibb and Upjohn in turn entered the market, each at prices which met the existing level (6771a-6835a).

Thus the charge was that for two years before Cyanamid and Pfizer are claimed to have conspired, each unilaterally charged "unreasonable" prices as a means or method to further a yet unformed conspiracy with respect to a yet

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* A pretrial motion to strike all the allegations of "unreasonably high" prices and profits as prejudicial surplusage was denied (356a-60a; 217 F.Supp. 199).

unintroduced drug; and that for the better part of two years before they are claimed to have become conspirators, Bristol, Squibb and Upjohn each unilaterally charged "unreasonable" prices as a means or method to further a conspiracy to which they were not parties.

B. "The pattern which the trial took."

In reversing, the court of appeals laid emphasis on "the pattern which the trial took" (12618a, 437 F.2d at 959). What was that pattern?

The court of appeals, in its condensation of the 12,583 page record, concentrated on what it arrayed as "the determinative facts" (12587a, 426 F.2d at 34). The court's description of the trial (12593a, 426 F.2d at 37-38) (a) started with the preliminary instructions of the trial court, preceding counsel's openings, in which the court, to provide a "framework" to "organize" the evidence, alerted the jurors to the charge that the conspiracy included the "creation . . . of unreasonably high prices;" (b) pointed up the stress in the government's opening upon "enormous" profits derived by comparing partial (factory) costs and selling prices—statements promptly challenged by motion for mistrial (12594a, 426 F.2d at 38); (c) noted the "vast amount of testimony and scores of exhibits relating to factory production costs and alleged profits," all offered in the "early weeks of trial," all objected to, all made the basis of motions to strike (12594a, 426 F.2d at 38); (d) reviewed, under a specific heading, the government's summation as to its claim of "unreasonably high profits" (12549a, 426 F.2d at 38); and (e) in this context scrutinized the adequacy and correctness of the charge to the jury.

This summary may helpfully be expanded somewhat. The jury was selected on October 23 and 24, 1967. The court's preliminary instructions stressed the accusation of

"unreasonably high prices" both as a means and as an effect of the alleged conspiracy (1468a).

The government then made an extensive opening statement (1476a-1500a). It pointed out that "[t]he conspiracy is alleged to have started in November, 1953" (1482a), as a result of "a meeting [which] took place between Mr. McKeen of Pfizer and Mr. Malcolm of Cyanamid (1484a)." The climax of the opening was to compare production costs with prices to retailers, and to assert that there were "enormous profits" and "huge bulk profit" (1498a).

The prosecution started its case by offering voluminous evidence concerning production costs and alleged profits. Though no evidence was offered purporting to establish what level of prices and profits would have been "reasonable" in the prosecution's view, the stipulated facts as to the price changes and the records as to "standard" or actual factory costs were claimed to show "unreasonably high" prices and profits. By pretrial and trial motions, objections, requests and exceptions, the defendants unsuccessfully sought throughout the proceedings to prevent the jury's being diverted to issues, which defendants maintained were inflammatory, as to whether prices and profits were "unreasonably high."

The prosecution rested on December 8, 1967. On December 15, 1967 Pfizer briefly recalled one witness and rested. Cyanamid elected to rest "on the record made in the court to date" (4601a). Bristol also rested. Thereafter, over defendants' objections (4606a-14a), the trial court delayed submission of the case to the jury for almost two weeks.

In his summation, the prosecutor heavily stressed the charges of "unreasonably high" prices and profits and of patent fraud. He asserted that the difference between factory production cost and ultimate selling prices—described by him as a "2000 per cent mark-up"—should be viewed as profit (4851a-52a). He asserted repeatedly that the jury

could infer conspiracy from the fact that prices had "not changed" for a period of almost nine years (4841a, 4847a, 4848a, 4853a), which of course included the two years before the claimed inception of the alleged conspiracy. The level of prices during the entire period was tied to the claim of "unreasonably high" profits based on factory costs, by a ringing ipse dixit that ". . . when the prices charged are as high as they are here compared to production cost, then the profits that flow from those prices are unreasonably high profits" (4847a).

The trial court on December 28 delivered its charge to the jury, the defects of which were pointed out by the court of appeals. On the night of December 29, the Friday preceding New Year's weekend, the jury returned its verdict.

C. Impropriety of the emphasis on the issue of "unreasonably high" prices and profits.

As noted above, the words "unreasonably high" do not appear in the charging paragraphs of the indictment but only in the "means and methods" and "effects" allegations. The draftsmen of the indictment obviously recognized that if there were, as alleged, a "continuing agreement and concert of action" to maintain "substantially identical and noncompetitive prices," it was immaterial at what level those prices were fixed. It is firmly established that the "reasonableness" or "unreasonableness" of prices is not a proper subject for consideration by a jury in a Sherman Act price fixing case. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). Language from *Trenton Potteries* is pertinent:

> "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. . . . [I]n the absence of express legislation requiring it, we should hesitate

> to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies" (273 U. S. at 397-98).

In this trial, the prosecution from opening statement through the evidence and in the closing arguments, with iteration and reiteration to satiety, drummed out its accusation of "unreasonable" prices and profits. These were explicit assertions and the court of appeals did no more than follow the teaching of this Court when it found that such accusations were pregnant with prejudicial tendency.

The "difference between legal and illegal conduct" in this case was being determined in the context of a criminal proceeding. The injection into the jury's consideration in a criminal case of an issue of "reasonableness" was particularly fraught with the danger of prejudice, as indicated by Donald F. Turner in a leading article,* where he referred to the above quotation from the *Trenton Potteries* opinion, as follows:

> "It should again be noted that the Sherman Act is a criminal as well as a civil statute. Though vagueness has become an accepted feature of Sherman Act law in spite of its dual character, the vagueness of 'reasonable' or 'competitive' price seems to go well beyond what is encountered in other antitrust problems" (75 Harv. L. Rev. at 670-71, n. 20).

Not unnaturally, the trial judge was unable to formulate any meaningful standard, in his charge to the jury, by which it was to determine whether prices and profits were "unreasonably high." The trial judge had been led to admit

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* Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962).

the evidence, though he was unsure on the point, and he solicited the prosecution's aid in handling it with the jury (1804a-05a). The prosecution's original requests (5223a-58a) did not touch the point; and the supplemental requests (5282a-86a) did not ask or propose the instructions which were given by the court. In denying post-trial motions for acquittal or a new trial, the trial judge criticized (6455a) the defendants for not submitting proposed instructions on a subject they considered immaterial and prejudicial,* but the charge as given was the work of the judge himself.

The petitioner's brief (Br. at 43-44) quotes a part, but less than one-third, of the lengthy charge relating to allegedly "unreasonably high" prices (4993a-99a). The part omitted included the fatally erroneous direction to the jury that if it should conclude that "the prices charged and the profits earned by the defendants were unusual or artificial or extraordinary or unreasonable" (4997a), this could be deemed evidence of price conspiracy, of conspiracy to monopolize, and of monopolization, as charged in the three counts of the indictment. No standard was provided. The jurors were left to apply these terms in any manner suggested by their own prejudices or predilections.** With the background of years of extrajudicial emotional public accusations that drug prices and profits were "unreasonably high," an instruction which so overstressed the matter without defining some standard was clearly prejudicial.

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* Cyanamid did submit a request which, while not acceptable to the judge, reflected the minimum curative treatment that could be originally appropriate (5297a-5303a).

** *Cf.* the lack of any objective standard in the approach of the dissenting opinion: "when profits were so enormous. . . ." Through the pertinent years 1953-1961 inclusive, the Lederle Division of Cyanamid averaged 16.9% net earnings after income tax on its sales as a whole (GX 872, 873 at 10226a-41a) as against annual budget objectives of 15% (2070a). At what point lower than this would the dissent have deemed profits no longer probatively "enormous"? No hint is given in the dissenting opinion.

The petitioner, as it has earlier, urges that the trial judge did not act improperly in admitting evidence of standard factory costs and in allowing the prosecution to argue as if the entire spread between factory costs and selling prices were profit, although evidence of additional costs was available to the government. The petitioner asserts that the defendants could have offered such additional evidence in defense. If any cost and profit evidence was to be admitted in the prosecution's case, however, complete proof should have been required, as it is in income tax cases where the government employs the "net worth" method as circumstantial evidence of understatement of income. *Holland* v. *United States,* 348 U. S. 121, 135, 137 (1954). The position taken by the trial court and urged by the petitioner would require the defendants to offer a defense which would further emphasize the effect of the inflammatory claims, and would further divert the jury in a prejudicial manner from the true issue of whether a conspiracy had been established.

The treatment of the subject of price and profit levels must be considered in the light of the public atmosphere resulting from extraneous publicity. We have described this in some detail in our counter statement. The extent and nature of the publicity were brought to the trial court's attention before, during and after the trial. In denying defendants' post-trial motions for acquittal or a new trial, the judge indicated a view that the jury had not been affected, and said (n. 5, 6468a) that there was "nothing here like the lurid circumstances, for example, in *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966), and *Irwin* v. *Dowd,* 366 U. S. 717 (1961)."

The effect of the publicity was perhaps subtler than in the cited cases, but it greatly enhanced the prejudicial effect of the overemphasis on the claims relating to price levels. The public from which the jury came had been subjected

for years to repeated accusations reported in the press and other media that drug companies, including the defendants, had made reprehensibly excessive profits at the expense of sick people. Even if this were true, of course "guilt" of "profiteering" would not establish that the defendants were guilty of the conspiracy with which they were charged, but the extrajudicial publicity had an inevitable tendency to divert attention from the actual charges. Against this background, the stress in the indictment, in the evidence and summation, and in the judge's charge on the claims of "unreasonably high" prices and profits especially obscured the fact that what the jury was to decide was whether the defendants had conspired, not whether they had made "too much" money.

The petitioner's brief argues (Br. at 39-42) that evidence of "high" price and profit levels is admissible, but that is not the issue.* The court of appeals did not pass upon the question as to whether the evidence was inadmissible; the reversal was based on the handling of the matter in light of the overall circumstances with the result that the defendants were denied a fair trial.

Throughout the proceedings there has been a somewhat muted defense by the petitioner of the use of claims of excessive profits by asserting the relevance of this as showing monopoly power (Br. at 42). This approach ignores the fact that the products involved were covered by patents which conferred a monopoly. It was unnecessary for the prosecution to offer more as proof of monopoly power than to show the existence of the patents and the standing in the relevant market of the firms owning them. All facts neces-

* The petitioner's brief dubs the evidence relating to allegations of "unreasonably high prices and profits" as being "admittedly relevant" (Br. at 39). On the contrary, the basic objection to this evidence covers more than three printed pages (1689a-92a) and was asserted repeatedly during the trial by reference (with the trial court's permission).

sary for this were stipulated, and the contention that the admitted factual situation resulted in a conspiratorial monopoly was a matter for argument. What the court of appeals referred to as the "inflammatory issue," of whether as a result of the situation the defendants made "unreasonably high" profits, was superfluous. Its injection, in view of the background of publicity, the use of the spread between factory costs and selling prices as though it were all "profit," and the emphasis on the matter in the trial court's instructions, recalls to mind the comment of this Court in *Fiswick* v. *United States,* 329 U. S. 211, 218 (1946): "Though we assume there was enough evidence to go to the jury on the existence of that conspiracy, the case was one which a prosecutor would be anxious to bolster." The penalty of the effort to bolster the weak case here presented was to produce an atmosphere in which the defendants were deprived of a fair trial.

III.

The excessive emphasis on uniformity and rigidity of published prices, weighed in the light of the facts of this case and of the theory adopted by the trial court, denied the defendants a fair trial.

The petitioner's brief says that the defendants and alleged co-conspirators "held to virtually the same prices . . . from six to ten years" (Br. at 37), refers to "ten years of utterly static pricing" (Br. at 48, n. 24) and urges that the fact that "pricing would continue so static so long under such circumstances is strong evidence of an agreement or understanding . . ." (Br. at 88). The references to "static" prices are to the fact that published prices of broad spectrum antibiotics to wholesalers and retailers and

private hospitals did not change substantially from October 1951 to July 1960.*

This was a market with only a small number of sellers—an oligopoly. Prices in such a market incline to be uniform and somewhat rigid. *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 363 (1963); *United States* v. *Aluminum Co. of America*, 377 U. S. 271, 280 (1964). As the Court said in the *Philadelphia National Bank* case, it is "common ground among most economists" that competition is likely to be greatest when there are many sellers. The converse proposition that when there are few sellers price competition is likely to be less, without agreement, is a necessary corollary.

In addition to being an oligopoly, the market involved is an inelastic one. The total demand for prescription drugs is dependent on the incidence of illness (2754a-55a), and the demand for a particular brand of antibiotic or other drug depends on the prescriptions of doctors and not on the purchasers' choices (1574a-75a, 2753a). Because of these facts, demand is not responsive to price changes.

The authors of the petitioner's brief quote (Br. at 48, n. 24), from an opinion of a court of appeals in a case reviewing a decision of the FPC, a passage stating that firms in an oligopoly market do not always seek or attain uniform monopoly price.** In contexts other than this case, the

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* The statement of facts in the petitioner's brief correctly states this to be the period (Br. at 23-24). The "ten years" referred to in the argument portions of the petitioner's brief quoted above is therefore somewhat exaggerated, since the period was less than nine years.

The petitioner's brief in the court of appeals ("G.Br.Ct.A.") conceded that in the CCS, Federal, and private hospital markets the actual prices were not uniform (G.Br.Ct.A. at 7, 16).

** *Northern Natural Gas Co.* v. *FPC*, 399 F.2d 953 (D.C. Cir. 1968). In the portion of the opinion in the *Northern Natural Gas* case quoted by the petitioner, the court said that one seller may believe he can maximize his profits by expanding his total sales rather than taking a maximum profit on each sale. Because of the inelasticity of the demand for prescription drugs a rational seller of these products could not believe this.

Justice Department itself has recognized that oligopoly pricing does tend to be uniform and rigid. In guidelines it issued in 1968 for determining the legality of mergers, the Department of Justice noted that a concentrated market structure "tends to discourage vigorous price competition" (1 Trade Reg. Rep. ¶ 4430, at p. 6682 (1968)).

In *United States* v. *Von's Grocery Co.*, 384 U. S. 270 (1966), a merger case, the government's brief in this Court stated that:

> ". . . Where the major sellers in a market are few, a price cut by one is likely to have so drastic and immediate an adverse effect upon the sales of the others as to compel them to respond promptly with matching cuts, thereby wiping out any competitive advantage won by the initiator of the reduction. Realizing this, competitors in an oligopolistic market have little incentive to cut prices. Oligopoly thus promotes price rigidity and discourages vigorous price competition, and in so doing tends to direct rivalry into other channels.
>
> ". . . When a few firms account for a large proportion of the sales of a market, each is likely to make his pricing decisions with conscious reference to the pricing policies of the others, and to be reluctant to initiate price reductions." (Gov't Br. in *Von's Grocery*, 21-22, 34-35)*

A tremendous volume of legal and economic literature has dealt with pricing in an oligopoly situation and with "conscious parallelism." One clear statement of the principle that price behavior may be "non-competitive" in an economic sense, without being the result of unlawful agreement, appears in the Turner article, *supra* p. 23, which was

* Justice Stewart, dissenting in *Von's Grocery*, 384 U. S. at 301, said that the only consistency he could find in the precedents under § 7 of the Clayton Act was that "the Government always wins." The disavowal in this case of the economic views the government has espoused in merger cases appears to be an effort to extend this kind of "consistency" to a criminal Sherman Act case.

published after the indictment. The author, trained both as economist and lawyer, was head of the Antitrust Division of the Justice Department at the time of the trial of this case. He wrote:

> "[T]here is fair ground for argument that oligopoly price behavior can be described as individual behavior—rational individual decision in the light of relevant economic facts—as well as it can be described as 'agreement.' It can readily be said that each seller in this situation, in refraining from price competition, is not agreeing with his competitors but simply throwing their probable decisions into his price calculus as impersonal market facts. . . . We could say that each seller has simply decided individually, perhaps after bitter experience, that it is more profitable not to indulge in price competition under any but the most pressing circumstances, appealing as price cutting might appear to be from a less experienced viewpoint." 75 Harv. L. Rev. at 666.

> "Parallelism will tend to prove that 'something more' exists only if the other evidence in the case suggests that the hypothesis of lawful oligopoly pricing—non-competitive prices resulting simply from recognized interdependence—does not account for all the facts. If that hypothesis is equally plausible on the facts, a case should be dismissed for the time-honored reason that a party with the burden of proof cannot be allowed to obtain a verdict or judgment that can be reached only by speculation." 75 Harv. L. Rev. at 672.

In the present case, there was, in the words of Professor Turner, a "rational calculation by each seller of what the consequences of his price decision would be, taking into account the probable or virtually certain reaction of his competitors" (75 Harv. L. Rev. at 661). There were four price reductions in the 1949-51 period, when it was not claimed there was a price agreement. Each reduction was

promptly met by all sellers, and no increase in sales appeared to result from the reductions.* A "rational calculation," therefore, would lead to independent decisions not to make further reductions.

Dr. Malcolm, the executive of Cyanamid responsible for pricing, described Cyanamid's experience with the four 1949-1951 price reductions and his recognition of the fact that usage of antibiotics depended on the incidence of disease and not on price. This taught him that any Cyanamid reduction would be met promptly by competitors, and that Cyanamid could not realize any economic advantage from price cuts (2748a-49a, 2754a-55a, 2801a). In light of this experience and his target net profit objective, Malcolm determined not to make further general price reductions unless either his company would gain some economic advantage thereby, or he was forced to meet reductions initiated by competitors (2745a-46a, 2749a, 2754a-55a).

The argument that the price decisions were independent draws support from instances where the same price policies were followed under conditions where they were not claimed to be the result of conspiracy. Parke, Davis had the same "static" and uniform prices as the alleged conspirators, but admittedly without being a conspirator, throughout the 1951-60 period. Pfizer and Cyanamid, in the 1951-53 period before the alleged conspiracy was claimed to have been formed, had identical and "static" prices. So, too, did Bristol, Squibb and Upjohn in the 1954-55 period before they were claimed to have joined the alleged conspiracy.

All these facts logically pointed to a conclusion that the defendants' conduct was not the result of conspiracy, but the trial judge's instructions discouraged the jury's reaching that conclusion. He told the jury, for example, to consider the evidence as to price stability "over substantial

* After the fourth reduction, in October, 1951, Cyanamid's 1952 sales were slightly lower than in 1951 (6848a) and total broad spectrum sales were only slightly higher (6848a-49a, 6853a).

periods of time" (4992a), without noting that in much of the time involved there was stability not claimed to have resulted from conspiracy. (See requests to charge, 5536a, 5195a; exceptions, 5012a-13a, 5040a.) In the prosecutor's summation he had stressed the long period of unchanged prices but had not mentioned that a substantial part of the period was before the alleged conspiracy. Both summation and charge thus tended to obscure the similarity of conduct outside and within the alleged conspiratorial period.

IV.

The trial court's treatment of the Parke, Davis evidence was prejudicial.

A major instance in which the trial court's instructions diverted the jury's attention from the fact that concededly non-conspiratorial conduct might indicate that similar conduct by defendants also was innocent involved the evidence as to the conduct of Parke, Davis, which was the manufacturer of Chloromycetin, one of the four broad spectrum antibiotics, and which was concededly not a member of the alleged conspiracy. In the opinion denying rehearing, the court of appeals said that ". . . it seems impossible to deny that the treatment which the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment" (12618a, 437 F.2d at 958-59).

The importance of the evidence relating to Parke, Davis, which included testimony and stipulated facts, was enhanced by other aspects of the instructions. The trial court instructed the jury that it did not have to find unlawful conspiracy entered into at any specific meetings, places or times (4951a, 4952a, 4963a-64a, 5000a), so that it might convict on the basis of inferences from the general course of conduct of the alleged conspirators. This made

highly significant the evidence of the like course of conduct of the admitted non-conspirator, Parke, Davis. The manner in which the trial court treated this evidence deprived the defendants of its logical force.

The petitioner urges (Br. at 60-65) that defendants were not improperly restricted by the trial court in arguments to the jury about Parke, Davis. Prior to the closing arguments, however, the trial judge expressed his reservations, *sua sponte*, as to whether the defendants should be allowed to argue at all about Parke, Davis (4543a). Later he flatly stated that he would stop any argument that Parke, Davis could be presumed innocent, and added that this would also apply to any reference to a presumption that business is conducted lawfully (4646a-47a).

As the petitioner states (Br. at 61), the trial court explained the last ruling on the basis that "a layering of other presumptions is not useful" (4647a). This confused the concepts of inferences and presumptions. The government offered the testimony of the individual who was president of Parke, Davis during the period, presumably on the theory that it might provide a basis for inferences favorable to the government and adverse to the defendants. Cross-examination, however, elicited testimony which would strongly support inferences favorable to the defense. Outside the presence of the jury, the government admitted that it did not contend that Parke, Davis was a conspirator, and affirmatively and unequivocally conceded that it was not (4527a). The petitioner mentions this admission but fails to point out that the jury was never told of that crucial admission, which went far beyond the equivocal statement that Parke, Davis "is not *alleged*" to be a conspirator (Br. at 71, emphasis added).*

* The petitioner (Br. at 70) suggests that there were "constant reminders at the trial that Parke, Davis was not *considered* a conspirator" (emphasis added), but fails to cite a single reference. Where references exist to show that a significant fact has been called

Certainly a defense argument of logical inferences to be drawn from the conduct of an admittedly innocent individual or company, in the course of which reference might be made to the basic presumption that one is innocent until proven guilty, cannot be described in any accurate sense as "layering" one presumption on another. This logical fallacy in the trial court's approach undoubtedly contributed to the error which it committed.

The petitioner makes the further remarkable contention (Br. at 64-65) that to allow the defense to make an argument relating to Parke, Davis which mentioned the presumption of innocence might have confused the jury by undermining the fundamental principle that an indictment is neutral and that the government must overcome the presumption of the defendants' innocence. The trial court could and did (4943a-44a) instruct the jury that an indictment is not evidence of guilt. Nothing in the record even hints at support for the petitioner's argument that the court's ruling was based on a paternal anxiety to protect the defendants from possible adverse effects of arguments their counsel strongly believed they were entitled to make.

The court of appeals held (12604a-05a, 426 F.2d at 44-45) that the trial judge erred in refusing to give Cyanamid's requested instruction which would have pointed out that Parke, Davis had a patent on Chloromycetin, that it granted no licenses and did not sell in bulk, that it had 23.8 percent of the broad spectrum market,* that its prices were substantially the same as those of the defendants, and that it was not claimed that the conduct of Parke, Davis was pursuant to conspiracy. The petitioner seeks to sup-

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to the jury's attention, the government is able to cite them: e.g., the twenty-one references cited, Br. at 81, as to the date Bristol allegedly joined the alleged conspiracy.

* In the period 1954-1961 Parke, Davis' sales of its broad spectrum antibiotic products totalled $267,000,000 (GX 875, 10244a).

port the trial court's refusal to give the instruction on the ground that it would have been one-sided because it did not point out the differences between the conduct of Parke, Davis and that of defendants (Br. at 65-66).

The "differences" which the petitioner claims existed resolve themselves in essence to the single fact that Parke, Davis was not involved in the manufacture or sale of tetracycline (Br. at 58-59). Parke, Davis, however, was an important factor in the broad spectrum antibiotic market as defined by the indictment (28a, ¶18). The record shows that Chloromycetin was directly competitive with tetracycline, and that it was the view of Parke, Davis that it could not exact higher prices than those charged for tetracycline (3357a-58a).

The petitioner's brief asserts that the defendants contend that ". . . the fact that a non-conspirator did some of the same things they did showed that their actions did not result from conspiracy" (Br. at 59). Aside from the fact that it was not defendants' burden to prove themselves innocent, the "some of the same things" done by Parke, Davis were things which, when done by defendants, were in themselves claimed to support an inference of conspiracy: namely, the charging of the same stable prices, refusal to license, and refusal to sell in bulk. Obviously, the thrust of the defendants' position and of the proposed instructions was that the prosecution's plea to infer guilt from certain undisputed conduct of the alleged conspirators might properly be rejected when the government's own evidence and stipulated facts demonstrated that the same conduct had been engaged in by an admittedly innocent competitor as a result of its independent decision.

The petitioner says that the requested and refused instruction carried an implication that conduct of the defendants that was similar to that of Parke, Davis "was not to be considered as proof of the conspiracy charged"

(Br. at 55). The conduct of the defendants could of course be argued as a basis for an inference against them, and the prosecution's freedom to labor that argument (which it did) was in no way restricted. The clash was as to the weight of the evidence, and it was precisely here that the trial court's error took hold. The stifling of legitimate argument and the refusal of appropriate jury instructions on evidence which was "all-important to the defendants" (12604a, 426 F.2d at 44) was a significant aspect of an unfair trial.

Equally without merit is the argument (Br. at 67) that the trial court was justified in refusing the requested instruction relating to Parke, Davis because the court had discretion as to whether to comment on the evidence. The petitioner quotes from an opinion which in turn quoted from *Quercia* v. *United States*, 289 U. S. 466, 469 (1933). The latter case, however, actually stands for the proposition that when a trial judge elects to comment on the evidence, as here, he must do so impartially. In the present case, the judge commented on the Parke, Davis evidence in such a way as to deprive the defendants of the benefit of its consideration by the jury as consistent with inferences favorable to the defense.

As the court of appeals concluded (12604a, 426 F.2d at 44), the charge which the trial court gave had the effect of suggesting to the jury that Parke, Davis might not have been innocent, and of foreclosing what weight in favor of the defendants the jury might have given to the Parke, Davis evidence. The judge told the jury in the same sentence that Parke, Davis was not on trial, and that the verdict concerning the defendants who were on trial must be based on "the law and the evidence relating to them" (5002a).*

* The petitioner omits five words in its quotation of the court's charge on this subject (Br. at 69). What the trial court said was

The petitioner (Br. at 71) is critical because the defendants did not specifically note, in excepting to the charge, the possibility that the jury might have thought Parke, Davis was not innocent. The defendants excepted to the entire charge relating to Parke, Davis. The procedural function of an exception is to afford the trial court notice of error in time to permit its correction. The whole colloquy on the scope of argument and the exceptions to the charge demonstrates conclusively that the trial court knew exactly where the defendants asserted his instructions and his actions were in error.

In its final argument relating to Parke, Davis the petitioner asserts that the jury's request for and receipt of the evidence during its deliberations indicates that the instruction of the trial court was not understood by the jurors as forbidding its consideration of the evidence (Br. at 72-73). As this Court has pointed out, however, a request by the jury during its deliberation is a compelling demonstration of the importance to the jurors of the evidence involved. *Fiswick* v. *United States*, 329 U. S. 211, 220 (1946). The point is not that the charge forbade consideration, but that it was calculated to prevent the jury's attaching to the evidence the weight which it logically deserved.

Neither the petitioner nor the defendants can know what occurred in the jury room. Shortly after they retired, the jurors requested a copy of the charge (5051a, 5060a), and each juror was given a copy. Cyanamid's counsel consented with stated reluctance due to the risk of misinterpretation in the light of the comments on the evidence which were included in the instructions (5052a-53a). The jury re-

"There is no profit here in speculating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here . . . ." etc. (5002a). This is materially different from the quote in the brief: "There is no profit here in speculating as to why Parke, Davis . . . is not on trial here."

quested the Parke, Davis evidence by referring to page and line numbers of the court's charge (5071a). Obviously the jurors were studying the instructions in connection with the requests. In the next paragraph of the charge after the one to which the request referred (5001a), the trial court made the remarks which the court of appeals found prejudicial.

A reasonable inference, the accuracy of which cannot be proved or disproved, would be that some juror or jurors had suggested that the Parke, Davis evidence indicated defendants' innocence. Others pressing for a conclusion of guilt well may have pointed out that the judge had hinted that Parke, Davis might not be innocent, and had instructed the jury to restrict itself to evidence concerning the defendants' conduct.

The dissenting judge in the court of appeals conceded that the defendants' construction of the charge as detracting from the force of the evidence concerning Parke, Davis was a "possible construction." He expressed the view, however, that "that possibility seems hardly serious enough to warrant reversal" (12614a-15a, 426 F.2d at 50). Thus the dissent admitted that the trial judge instructed the jury in a way susceptible of a construction by the jurors under which they would not accord proper weight to evidence favorable to the defense. This dissent was before the judges of the court of appeals who considered whether a reargument *en banc* would be granted. The majority of the judges participating concurred on the basis of the original and the supplemental majority opinions, the latter categorically concluding that ". . . it seems impossible to deny that the treatment the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment" (12618a, 437 F.2d at 958-59).

V.

The trial court's treatment of the testimony of the defendants' officers was prejudicial.

We have pointed out above the undisputed evidence that defendants, at times when they were not claimed to have been in a conspiracy, acted in a manner identical to their conduct during the period of the alleged conspiracy. This identity of admittedly innocent and allegedly guilty conduct was an important defense point. Therefore, it was essential that the probative weight of the explanations of the independent reasons for the actions, given from the stand by those responsible for the defendants' conduct, not be undermined by an erroneous charge.

The government in a detailed bill of particulars spelled out its theory of the case, which was that the alleged conspiracy had been entered into at specific meetings of identified individuals, who were the defendants' principal officials. This did not mean—and the defendants do not assert—that the government had to show an *express* agreement. The second opinion of the court of appeals clearly states that the reversal was not based on the view that an *express* agreement must be established. The accusation remains, however, that at specified meetings the defendants arrived at agreements, *express or implied, overt or tacit,* allegedly constituting a conspiracy. The petitioner plainly recognizes that this correctly interprets the opinions of the court of appeals, for in its discussion of the Pfizer-Cyanamid agreements that resulted from the November, 1953 meetings, the petitioner ". . . contends here that it was also understood between Pfizer and Cyanamid that neither would allow other companies into the market and that they would not compete with one another with respect to price" (Br. at 12).

In the opening statement, throughout the trial, and in the summation, the government consistently adhered to this

theory that the alleged conspiracy was entered into through identified individuals* at specified meetings (1106a-07a, 1130a-31a, 1482a, 1484a, 1495a-96a, 4220a-21a, 4829a-31a, 4853a-54a, 4867a, 4999a-5000a).** It was vitally important to the defendants that the jury be not misled or confused as to the significance and weight of the testimony of these individuals. The trial judge's charge told the jury, however, that the final answer to the central question of conspiracy "must be based upon the actual conduct of the defendants during the period covered by the indictment" (5000a), thus saying that inferences from market behavior rather than testimonial explanations of the reasons for the behavior and of what was said and done at the meetings must be the basis for the decision.

Cyanamid rested without offering evidence in reliance upon the rule of law that a case will be presented to the jury by the trial court's charge in accordance with the theory expounded in the indictment and the government's bill of particulars, which here was pressed by the prosecution throughout the trial. The court of appeals noted (12597a, 426 F.2d at 40) that requests for instructions which would have told the jury that it could convict only on the basis of the charges made in the indictment as supplemented by the bill of particulars were denied.

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* The three principal executives who testified had been indicted with their companies, but the indictment was dismissed as to them on the ground that they had received immunity by being required to testify before another grand jury, 422a, 245 F. Supp. 801 (S.D.N.Y. 1965). This permitted the government to call them as witnesses at the trial.

** The government continued to adhere to this theory in the court of appeals: "The agreement between Pfizer and Cyanamid to settle the first tetracycline interference was the focal point for the inception of the conspiracy" (G. Br. Ct. A. 69). The agreement was negotiated in November, 1953 at meetings attended by McKeen and Powers of Pfizer, Malcolm and Martin of Cyanamid (G. Br. Ct. A. 22-23). All of these individuals testified. "The entry of Bristol and its bulk customers into the conspiracy in December 1955 was made possible by the Broady wire-tapping episode" (G. Br. Ct. A. 71). The participants in these discussions—McKeen of Pfizer, Schwartz of Bristol—"testified extensively" as to the motivations and the discussions (G. Br. Ct. A. 56).

Not only did the trial judge refuse to give the requested instructions, but he included in the charge general statements indicating to the jury that it could ignore or discount the testimony as to the meetings and convict on vague and different theories. In instructions quoted by the court of appeals (12595a-97a, 426 F.2d at 38), the trial court stated that precise dates or extension of the conspiracy need not be proved, and that there need not have been any meetings or exchange of words in order to establish agreement. As abstract propositions of law such assertions may be correct, but in the context of the theory espoused by the government long before and during all the weeks of the trial they were fatally misleading.

As the court of appeals recognized, the charge of the trial court "slighted and rather deprecated the testimony about the meetings" (12598a, 426 F.2d at 40). The second opinion again referred to the charge with respect to the officers' testimony as error (12618a, 437 F.2d at 959). No basis exists to support the implication of the petitioners (Br. at 52) that the court of appeals had in some way withdrawn its criticism of the treatment of this testimony.

The trial court referred to the officers as having denied "in broad terms" the existence of conspiratorial agreements and understandings and as making "assertions of innocence" (5000a-01a). As the court of appeals noted (12598a, 426 F.2d at 40), however, the officers testified at length concerning the business problems created by the tetracycline patent situation, and specifically stated what particular subjects were and what others were not discussed at meetings. The petitioner itself recognizes (Br. at 49-50) that the denials were specific, and that the officers testified to the business reasons for their actions.

The trial court's charge asserted that ". . . the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter" (5001a).

This suggested that the court saw some inconsistency between the officers' testimony at the trial as to the occasions for, scope of discussion at, and results of the crucial meetings and some other (unidentified) evidence as to "the things the defendants did and said at the time." The petitioner does not point out any basis in the record for such an interpretation of the record, and there was in fact no such inconsistency.

Finally, the lower court stated that the "assertions of innocence" might reflect "partly legal as well as factual contentions." There was no explanation of what might be "legal" and what "factual." Since the jury had been told at the very beginning of the charge that it was its duty to follow the court's instructions on the law (4941a), it was left uncertain as to what part of the testimony it could accept.

The petitioner now seeks to defend these instructions on the theory that "[w]hether an 'agreement' illegal under the Sherman Act has been made is a mixed question of fact and law" (Br. at 51). Opinions of this Court in four civil non-jury government Sherman Act cases are cited. The opinions indicate that the "law" part of the "mixed question of fact and law" was regarded as being the ultimate issue of whether there was or was not a conspiracy. *See, e.g., United States* v. *General Motors Corp.*, 384 U. S. 127, 141-42, n. 16 (1966). This rationale was adopted to explain that the provision of Rule 52(a) of the Federal Rules of Civil Procedure that findings of fact shall not be set aside unless "clearly erroneous" did not prevent reversal of a trial judge's conclusion that, on the basis of underlying facts he had found, no conspiracy had been shown.

The decisions cited are not apposite in the present case, which is not a civil but rather a criminal proceeding in which we are concerned with instructions to a jury of laymen. When the government elects to institute a criminal

Sherman Act case, it brings into play not only antitrust law but also basic principles applying in all criminal cases.

One such principle is that when the judge in a criminal trial instructs a jury as to matters of law, the jury should follow his instructions on such matters. *Sparf & Hansen* v. *United States*, 156 U. S. 51 (1895).* If the cases cited by the petitioner meant that the ultimate question of conspiracy is one of "law" on which a judge may charge a jury in a criminal case, the court might instruct that a conspiracy had been shown, and thus take the ultimate issue from the jury. But such a result cannot be harmonized with the more basic doctrine that a judge may not direct a verdict of guilty in a criminal case. *Sparf & Hansen* v. *United States, supra*, 156 U. S. at 105. This doctrine applies, of course, to a criminal Sherman Act case. See *Brotherhood of Carpenters* v. *United States* 330 U. S. 395, 408 (1947), where a conviction was reversed because of erroneous instructions.

The *Sparf* case rests upon a recognition that for purposes of a criminal jury trial there cannot be a "mixed question of fact and law," in the sense that the same question is to be passed upon by both judge and jury. As the jury is precluded from deciding matters of law, so the judge is precluded from deciding questions of fact. Because a jury in a criminal case can return only a general verdict of guilty or not guilty and is not required, and indeed is not per-

*In the *Sparf* case, the Court disposed of a problem as to whether juries could decide issues of law, which had been discussed and litigated with varying results in the lower federal courts for over a hundred years. See Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 588 (1939); *Skidmore* v. *Baltimore & O.R.R.*, 167 F.2d 54 (2d Cir.), *cert. denied*, 335 U. S. 816 (1948). The rationale of the Court was the reasonable one that if juries had the *right* to decide issues of law, there would be no general law but only diverse opinions of different juries. Although realistically juries have the *power* to disregard a judge's instructions as to the law, a rule that they should follow them at least preserves uniformity of stated legal principles.

mitted, to explain its deliberations, it is impossible to determine from a verdict whether the jury actually limited itself to issues of fact or improperly decided questions of law.* If juries are to understand and obey the admonition to follow judges' instructions as to law, those instructions must make clear the matters to which the admonition relates.

A judge in a federal criminal trial may comment on the evidence in instructions. "But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province." *Starr* v. *United States,* 153 U. S. 614, 625 (1894). This may be difficult in a case involving a question which, like that of antitrust conspiracy, can be described in the context of a civil case as a "mixed question of law and fact." In such a case, if comments are made, the issues of fact must be separated from the rules of law and care taken not to confuse the jury.

The petitioner, in attempting to defend the instructions, demonstrates the potentialities for prejudice in the unexplained statement of the trial judge that the testimony of the defendants' officials might reflect "partly legal as well as factual contentions." In a criminal jury trial the issues submitted could not properly be allowed to remain "mixed." The description of the testimony as "contentions" which might be "legal," so that their validity should not be passed upon by the jury, could naturally lead a conscientious juror to think that he should not consider the testimony at all.

The petitioner urges (Br. at 51) that the effect of the instructions as to the testimony, in which the court of appeals found error, was corrected by general statements about the credibility of witnesses and generalized instruc-

* This defect in general verdicts is discussed at length in Judge Jerome Frank's exhaustive opinion in *Skidmore* v. *Baltimore & O.R.R., supra,* in which he advocates special verdicts in civil cases as a control, but such verdicts are not available in federal criminal trials.

tions about normal independent business decisions. This ignores the vital importance to the defendants of the jury's views as to the specific testimony of the particular witnesses which was deprecated in the charge. The opinion in *Bihn* v. *United States*, 328 U.S. 633 (1947), dealt with a similar argument. The Court there said that general instructions as to reasonable doubt, which "would be adequate standing alone," did not correct an instruction that suggested a different standard with respect to a specific issue in the particular case (328 U. S. at 637).

The court of appeals recognized the propriety of devoting part of a jury charge to "necessary generalities" (12599a, 426 F.2d at 41). The basis for the holding that the instructions here were not adequate, however, was that the charge as a whole did not focus the jury's attention on the primary issue, namely, whether the participants in the crucial meetings had conspired as charged (*id.*).

The petitioner's brief, noting that officials of defendant companies in antitrust cases frequently deny illegal agreements, says that such denials "may be deliberate untruths or may rest upon the witness' honest but mistaken view of the legality of their acts" (Br. at 52). There is another alternative: that the denials may be truthful, and rest upon the witness' honest and correct view that their acts were legal. The chance that the jury would so conclude in this case was virtually eliminated by the trial judge's charge.

VI.

The trial court's treatment of patent matters was prejudicial.

The court of appeals noted, with respect to the charges of conduct relating to the obtaining of the tetracycline patent, that the trial "was virtually diverted from an antitrust conspiracy case to a patent fraud case" (12599a, 426 F.2d

at 41). The Patent Office evidence at most was only indirectly relevant. Misconduct in the Patent Office was not alleged to be one of the terms of the conspiracy, but only one of the "means and methods" (34a). The government admitted that it had no evidence that the defendants had conspired to defraud the Patent Office (4135a, 4520a) and virtually conceded that it looked to the evidence primarily to create a general smear, urging in summation that it generally would "reflect on the personnel involved in some way" (4883a). The trial judge devoted a large part of his instructions to this matter. As the petitioner indicates (Br. at 56), the issues and evidence involved were technical and complex. It is unlikely that the lay jury understood them, and the net effect of the stress (as was also true of the claims of "unreasonably high" prices and profits) must have been simply to give an impression that the defendants were "bad."

The court of appeals held that the overemphasis in the charge to the jury on patent matters, like that on "unreasonably high" prices and profits, was prejudicial. It noted that ". . . nowhere was the jury told in clear language that the Patent Office proceedings were relevant only insofar as the acts of Pfizer and Cyanamid supported an inference that at the November 1953 meetings they had entered into agreements to fix prices or to exclude others" (12600a, 426 F.2d at 41).

The petitioner argues (Br. at 54) that such an instruction would have been wrong because it "improperly assumes that the conspiracy must have been expressly agreed to on those dates." This is not so; as recognized above, there need not have been an *express* agreement. The court of appeals meant, correctly, that the emphasis the trial court put on charges of allegedly improper unilateral conduct tended to divert the jury from the fact that the ultimate charge was a conspiracy which the government on every occasion dated from November, 1953.

The petitioner also urges that the defendants were not surprised by the charge on patent matters or its length because the trial judge earlier had read to them part of what he proposed to say on the subject (Br. at 57). Whether the defendants were or were not surprised by an erroneous charge seems an immaterial issue for a Supreme Court argument, but in any event, since the judge did not give the defendants his entire charge in advance, they had no way to appraise the relationship of the portion he read to them to the rest of the charge.

The exaggerated emphasis in the instructions on the aspects of the case relating to the obtaining and effect of the tetracycline patent is echoed by some statements in the conclusion to the petitioner's brief. The petitioner there refers (Br. at 89) to an "attempt to monopolize," and cites a Sixth Circuit decision affirming findings of the FTC that there were violations of Section 5 of the FTC Act in connection with procuring the patent.

This appears to be an effort to classify this as a case like *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).* In the present case, however, there was no charge of an "attempt to monopolize," but a charge of *conspiracy* to exclude competitors and fix prices. In the FTC case which the Sixth Circuit affirmed, although the Commission found unilateral violations of the FTC Act, it held that the evidence (substantially the same as that adduced in this case) did not establish conspiracy to obtain a patent by fraud on the Patent Office or to use it to exclude others (63 FTC at 1862-64).

* If the *Walker* case were pertinent, it seems clear that the trial judge here had no conception of the fact that "[t]he road to the Patent Office is so tortuous and patent litigation is usually so complex, that 'knowing and willful fraud' as the term is used in *Walker*, can mean no less than clear, convincing proof of intentional fraud involving affirmative dishonesty, 'a deliberately planned and carefully executed scheme to defraud . . . the Patent Office,'" *Cataphote Corp.* v. *DeSoto Chemical Coatings, Inc.*, 5 Trade Reg. Rep. ¶ 73,750, at 91, 177 (9th Cir. Nov. 4, 1971).

The remarks in the conclusion of the petitioner's brief in this Court would seem to indicate that counsel fail to recognize that the Patent Office proceedings were relevant only if they tended to show the conspiracy charged. The fact that the petitioner itself misses this crucial point supports the conclusion of the Second Circuit that the charge did not make it clear to the jury.

VII.

The cumulative effect of the various errors materially enhanced their prejudicial effect on the defendants.

The court of appeals, having found and discussed a series of errors which individually warranted reversal, then considered their cumulative and interrelated impact. It also concluded that the errors, "when taken as a whole, were sufficient to deprive the defendants of a fair trial" (12618a, 437 F.2d at 958).

The interrelation of the various aspects of the trial court's instructions as to which the court of appeals found error was particularly damaging to the defense. This may be illustrated by drawing together three of the matters thus far considered.

The instructions relating to the officials' testimony put the case to the jury in terms of a general course of conduct rather than of the specific theory on which the government had presented its case. This made consideration by the jury of the similar conduct of Parke, Davis crucially important to the defendants, but the trial judge's charge could be read as telling the jurors not to give weight to the Parke, Davis evidence. And the great emphasis in the instructions on the charges of "profiteering" tended to make this matter one on which the jury would focus rather than on the charge of conspiracy or on the evidence which pointed to innocence.

VIII.

The sufficiency of the evidence to support a verdict of guilty is not the issue here, but the closeness of this case is a factor to be considered in determining whether the errors below denied the defendants a fair trial.

The defendants throughout this long and tortuous controversy steadfastly have maintained their innocence, and continue to do so. But the question in the court of appeals was not, and the question here is not, whether the defendants are or are not guilty of the conspiracy charged in the indictment. The court of appeals found it unnecessary to pass upon the sufficiency of the evidence.*

The Court repeatedly has stated that when a jury in a criminal case has reached a guilty verdict following a trial wherein there were prejudicial errors, an appellate court should not affirm the conviction on the ground that it would itself have concluded from examination of the record that the defendant was guilty. For example, in a concurring opinion in *M. Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946), where error was found and a conviction reversed, but it was claimed that the evidence was sufficient to sustain the verdict, Mr. Justice Douglas said:

> "But it is not enough that we conclude on the whole record that a defendant is guilty [citation omitted]. The jury under our constitutional system is the tribunal selected for the ascertainment of guilt" (327 U. S. at 628).

In another opinion the following year, in *Bihn* v. *United* States, 328 U. S. 633 (1947), writing for a majority of the

* Note, however, that the court of appeals inclined to the view that there was insufficient evidence to warrant submission to the jury of the issue of a conspiracy to exclude between Bristol and Pfizer and Cyanamid (12619a, 437 F.2d at 959). The implication of that view as to Cyanamid is discussed in the next point.

Court in a case where, as here, the trial judge's instructions might have misled the jury as to a vital issue in the case, Justice Douglas stated:

> "While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historical functions of the jury under our system of government. See *Bollenbach* v. *United States*, 326 U. S. 607" (328 U. S. at 638-39).

In the cited *Bollenbach* case, the Court in dealing with an erroneous charge to a jury on the basis of which it reversed a conviction, stated that ". . . the question is not whether guilt may be spelt out of a record but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts" (326 U. S. at 614). Referring to the "harmless error" statute, the Court concluded:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be" (326 U. S. at 615).

Accord, Weiler v. *United States*, 323 U. S. 606 at 611 (1945).

The test of whether trial errors are "harmless" has been expressed by the Court as follows:

> "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States,* 328 U. S. 750, 765 (1946). See also *Fahy* v. *Connecticut,* 375 U. S. 85, 86-87 (1963).

Under precepts of this Court faithfully followed by the court of appeals in this case, while an appellate court should not invade the province of the jury by undertaking to convict on the basis of a view that the evidence showed guilt, the closeness of a case is an element to be considered in determining whether a trial error was harmless. The following language of *Glasser* v. *United States,* 315 U. S. 60, 67 (1942), is not limited to cases involving explicit constitutional arguments such as were there involved, but applies equally to other types of error which deprive the defendant of a fair trial:

> "• • • where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

Accordingly, in the *Kotteakos* case, *supra,* the Court said that an error in the exclusion or admission of evidence or in jury instructions might not call for reversal in the face of "other clear evidence," but that if the same error "might

turn scales otherwise level," it would not be harmless (328 U. S. at 763). Accord, *Bihn* v. *United States*, quoted *supra*.

The petitioner implicitly recognizes this principle when it argues that the evidence was "ample" (Br. at 37), that the case against respondents was "strong" (Br. at 89), and that the evidence of guilt was "substantial" (Br. at 90). The court of appeals obviously did not agree. In our counter statement, we have noted various occurrences in the course of this proceeding and the related FTC proceeding that objectively support the court of appeals' evaluation. Argument that there was an insufficiency of evidence to support a verdict of guilt beyond a reasonable doubt is not necessary. Cyanamid asserts the unquestionable soundness of the court of appeals' conclusion that under these circumstances the accuracy and internal balance of instructional comments on the evidence were of telling importance, and warranted the examination of errors to determine whether they might have contributed substantially to the result. The court of appeals concluded that they might have. This Court should uphold that conclusion.

IX.

There were errors of the trial court other than those for which the court of appeals reversed.

Cyanamid and the other defendants advanced numerous contentions in addition to those on which the court of appeals based the reversal. The opinion denying rehearing made clear that the court had not rejected these points, but had not felt it necessary to reach them (12619a, 437 F.2d at 959).

An important ground centering on Bristol was also of vital significance to the other defendants. In denying rehearing, the court of appeals expressed its inclination to

the view that there was insufficient evidence to warrant submission to the jury of the issue whether Bristol had conspired with Pfizer and Cyanamid to exclude others from the tetracycline market (12619a, 437 F.2d at 959). This conclusion alone would compel a new trial, as the court of appeals observed, and it necessarily would be a new trial as to all defendants.

A proper instruction in favor of Bristol on this point would have altered the entire perspective of the case as to Cyanamid. As Bristol went out on this phase, it would carry with it its so-called co-conspirator customers Squibb and Upjohn, since they were named only because they bought in bulk from Bristol and resold in finished form. The charge of conspiracy to fix prices might or might not have remained in the case as to these companies. But even if it did, a very different market status would be presented to the jury.

Insofar as conspiracy to exclude is concerned, the jury then would be dealing with a market in which six companies were competing in the sale of substantially interchangeable broad spectrum antibiotics: Cyanamid and Pfizer, still charged with a conspiracy to exclude which would be readily seen as obviously abortive; Parke, Davis, conceded by the government not to be a conspirator; Bristol, Squibb, and Upjohn, now cleared of the charge of conspiracy to exclude. In this market, Bristol under the terms of its license from Pfizer would stand free to sell in bulk to as many customers as it chose (GX 50, 8482a).* It would be interesting to spec-

* The petitioner inadvertently implies that the Pfizer-Bristol license agreement (GX 50, 8480a-8500a) limited Bristol to its two "presently existing bulk customers" (Br. at 22). This distortion must have resulted from a failure of the brief writer to read the license which is in the record. "Bulk customer" is defined generically to include any customer buying the product and reselling under a label different from that of the seller (¶ 8, 8482a). Bristol is granted an unlimited right to grant sublicenses to an unlimited number of customers to compound, use, and sell tetracycline products (¶ 2, 8484a), subject only to the requirement of royalty payments as set for Bristol and its then existing bulk purchasers (¶ 3, 8484a-85a).

ulate as to how the petitioner would argue that Cyanamid and Pfizer then were guilty of a conspiracy to exclude when innocent Bristol had full power freely to sell in bulk to any number of potential fabricators and sellers. Since there can be no way to estimate the influence of the erroneous submission on the minds of the jurors when they were considering their verdict as to Cyanamid, reversal of course would be required. *Cf. Wheaton* v. *Sexton's Lessee*, 17 U. S. 503, 508 (1819).

Cyanamid will not lengthen this brief by a discussion of other material complaints which the court of appeals did not find it necessary to resolve. The briefs filed by Cyanamid in the court of appeals are part of the record here, and the arguments made in them on these matters will show their merit.

The careful review given the case by the court of appeals resulted in its decision that reversal of the convictions was required for the reasons it stated. The fact that there are other good reasons which the court did not reach is an additional ground for affirmance by this Court.

CONCLUSION

The petitioner's brief in its conclusion advances three arguments:

First, it once again urges that the evidence was sufficient to show guilt (Br. at 88-89). But the basis of the reversal, as shown above, was not insufficiency of evidence but the denial of a fair trial.

Secondly, it again argues (Br. at 90) that the reversal will impair "the deterrent effect that the threat of criminal prosecution was designed to have on potential violators" of the Sherman Act. This result will arise, the petitioner contends, because the reversal was based ". . . on the theory that because the case was 'close' slight errors in the trial might have had a decisive impact on the jury. . . ."

This is an extraordinary argument, but that the petitioner is wedded to it becomes evident from the fact that it is advanced at least thrice in its brief. Initially it appears at page 36. The chord is struck again at page 46. But the argument is posed in the conclusory section of the brief in its most startling form. The petitioner there confesses in essence that the government cannot try a "large and complicated" case without either its or the court's committing "genuine errors" (Br. at 89). Decades of successful prosecutions repudiate this proposition. The petitioner pleads that a guilty verdict resting upon a trial record containing "genuine errors" is entitled to "hospitable treatment" in appellate courts where the indictment concerns "the enforcement of laws designed to preserve free competition and free entrance into markets and honest business dealings." These are emotion packed words more suitable for a jury argument than a reasoned submission to this Court. Apparently feeling that in this case "genuine errors" did not receive "hospitable treatment," it laments that "the prosecution of major Sherman Act violations will be seriously impaired."

Nowhere in these protests does the petitioner evidence sensitivity to the pernicious tendency of the laxity which it argues. Contrary to all the concepts of just procedures, it solicits judicial blessing upon unjust convictions of the innocent. The author cannot have absorbed the words of Mr. Justice Rutledge in *Kotteakos* v. *United States*, 328 U. S. 750, 773 (1946):

> "True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent. . . ."

Thirdly, the petitioner argues, in much the same vein, that the case does not involve "a violation of basic constitu-

tional rights," and is not "one in which a person's life is at stake," and that in determining whether error requires reversal "what is at stake upon its outcome" is material (Br. at 91). We respectfully submit that the commission of genuine errors adding up to denial of a fair trial deprives a defendant of a basic constitutional right. This is a federal case, and the question is whether "the procedure and standards appropriate for criminal trials in the federal courts" were applied. *Bollenbach* v. *United States*, 326 U. S. 607, 614 (1946). While "what is at stake" has some relevance in determining whether errors in a trial are harmless, much also "is at stake" when an agency of the United States government considers it "harmless" that a defendant in a criminal case has been deprived of a fair trial. The distinction between misdemeanors and felonies does not mean that only felony defendants are entitled to fair trials. See *Groppi* v. *Wisconsin*, 400 U. S. 505 (1971).

Accordingly, the judgment of the court of appeals should be affirmed, and this case should be remanded to the district court so that the defendants may be accorded a fair trial consistent with the court of appeals' opinion.

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December 15, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-72

UNITED STATES OF AMERICA,
Petitioner,

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY and BRISTOL-MYERS COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BRISTOL-MYERS COMPANY

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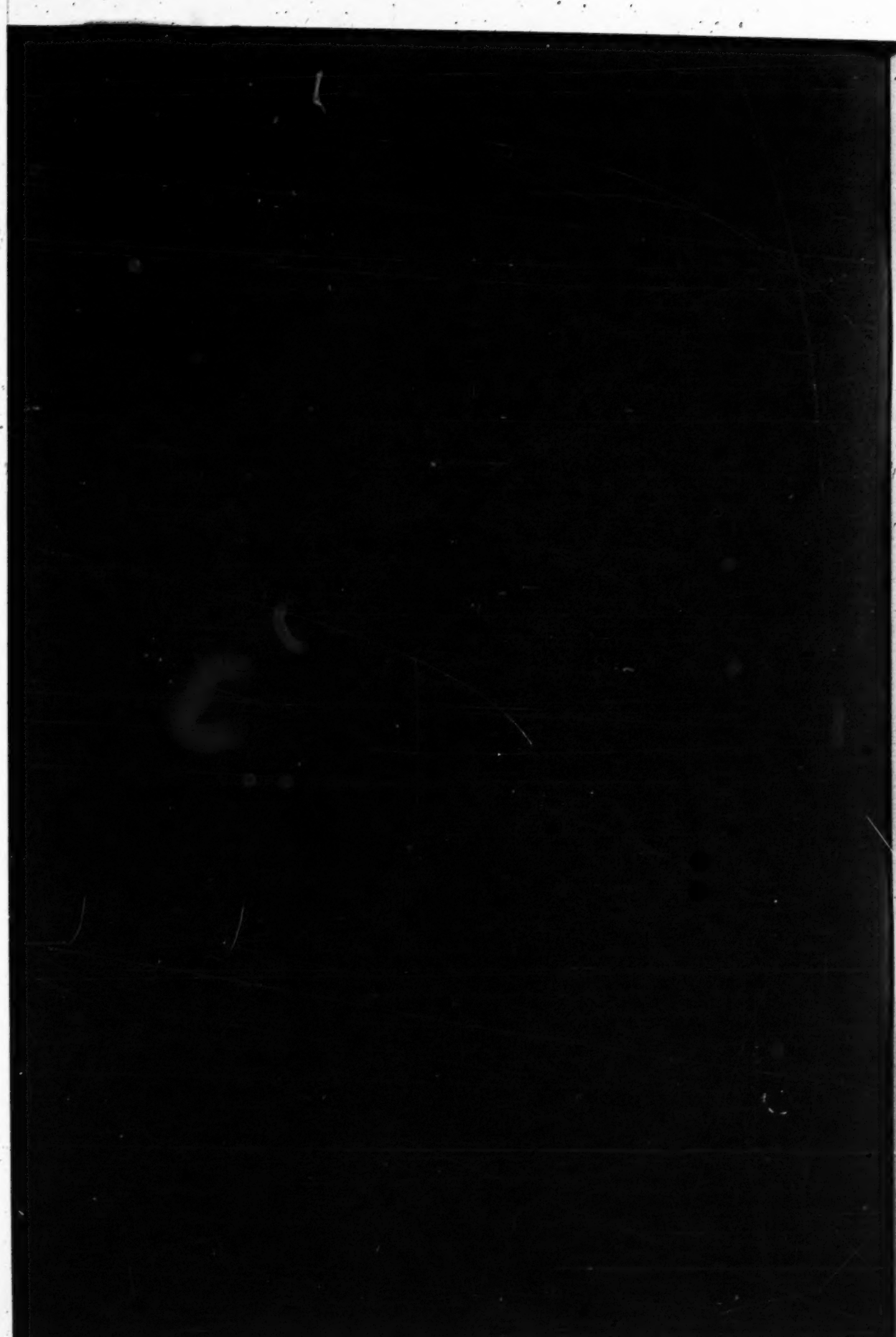

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IN THE

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OCTOBER TERM, 1971

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CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY and BRISTOL-MYERS COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BRISTOL-MYERS COMPANY

Respondent Bristol-Myers Company ("Bristol") files this separate answering brief because

(a) A separate statement is required on Bristol's behalf emphasizing the important differences in the facts and in the results of prior proceedings which distinguish Bristol's position from that of the other respondents, and

(b) Two of the errors found by the Court of Appeals have special applicability to Bristol:

1. The trial court erroneously instructed the jury that the licenses to Olin Mathieson Chemical Corp. ("Squibb") and The Upjohn Company ("Upjohn") barred them from the manufacture of tetracycline.

2. The trial court erroneously failed to charge the jury with respect to the significance of Bristol's

"pre-conspiracy" conduct and compounded this error in the instructions respecting the date when Bristol allegedly joined the conspiracy.

As to other matters common to all respondents, Bristol joins in the briefs filed by Chas. Pfizer & Co., Inc. ("Pfizer") and American Cyanamid Company ("Cyanamid").

QUESTION PRESENTED

The government states that the first question presented is "whether, in reversing criminal convictions * * * because of alleged errors in the instructions, the court of appeals applied an improper standard of review by considering particular language in isolation rather than evaluating the charge in its entirety in the light of all the evidence and the defendants' arguments to the jury" (G.Br. 2).

This begs the question rather than poses it. The Court of Appeals did not consider particular language "in isolation" or fail to evaluate "the charge in its entirety" or fail to consider "all the evidence and the defendants' arguments to the jury." The majority below expressly refers to "its review of the *entire charge*"* (426 F.2d at 41; 12598a) and concludes with the statement:

> "A review of the *entire record* leads to the conclusion that the judgments of conviction against Cyanamid, Pfizer and Bristol must be reversed and that a new trial be had as to them." (426 F. 2d at 48; 12611a)

In its statement of the second question presented, the government purports to describe each of the errors found by the Court of Appeals. But this description is neither complete nor entirely accurate.

* Emphasis ours. Unless otherwise noted, emphasis in passages quoted in this brief will be ours.

Properly stated, the controlling question presented for review is:

> Whether the Court of Appeals is correct in holding that the errors committed by the trial court were sufficiently prejudicial to deprive Bristol of a fair trial.

STATEMENT OF FACTS

The Sufficiency of the Evidence against Bristol

The question of the sufficiency of the evidence is not before this Court.* The government, however, has sprinkled its brief with gratuitous references such as "comprehensive evidence of conspiracy" and "ample evidence to convict," and has stated that the case against Bristol "was a strong one" (G.Br. 32, 49, 89). The very opposite is true, as the results of the prior proceedings amply demonstrate.

1. The same charges were tried in a lengthy proceeding before the Federal Trade Commission, *Matter of American Cyanamid, et al.* (F.T.C. Docket No. 7211). The Hearing Examiner held that none of the charges had been sustained (TRADE REG. REP. [1961-1963 Transfer Binder] ¶15,537).

2. On an appeal to the Commission, the Initial Decision was unanimously affirmed as to the monopolization aspects of the alleged conspiracy but not as to the pricing aspects (63 F.T.C. 1747). The Commission's decision as to the pricing aspects was vacated by the Sixth Circuit (363 F.2d 757), and in subsequent proceedings before the Commission the

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* The question of the sufficiency of the evidence was raised in the Court of Appeals. It was one of the "many other contentions advanced by the defendants" which the Court of Appeals did not reach (opinion denying rehearing, 437 F.2d 957, 959; 12619a). See respondents' briefs before the Court of Appeals on file with clerk of this Court.

price-fixing charges were dismissed by a 2-2 vote ((Sept. 29, 1967), TRADE REG. REP. [1967-1970 Transfer Binder] ¶18,077). The Commission did reaffirm findings that Pfizer and Cyanamid separately had misconducted themselves before the Patent Office. But with respect to Bristol, all charges were dismissed.

3. In this criminal case the Court of Appeals clearly regarded the case against the respondents as a close one. The majority referred to it in the opinion denying rehearing as "a criminal case so close as this" (437 F.2d at 959; 12618a). Even the dissenting judge conceded that the government's evidence was "not overwhelming" (426 F.2d at 48; 12611a).

4. The majority below commented that one of the "most persuasive" contentions which they did not reach in their decision was "Bristol's argument that there was insufficient evidence to warrant submission to the jury of the issue whether that company had conspired with Pfizer and Cyanamid to exclude others from the tetracycline market." The Court went on to say that "we now incline to that view" (437 F.2d at 959; 12619a).

5. In an opinion approving the settlement of certain civil cases against the respondents based upon the allegations of the Federal Trade Commission complaint and the indictment below, the Honorable Inzer B. Wyatt, United States District Judge for the Southern District of New York, considered the plaintiffs' "probabilities of ultimate success." He made the following comment:

> "The situation here is unique in that the evidence on which liability at trial would depend is in substantial part before the Court on this application. That evidence is in the extensive record before the Sixth Circuit Court of Appeals in the Commission proceeding and in the extensive record before our Court of Appeals in the criminal proceeding.
>
> "A careful study of those records leads to a conclusion that the chances of recovery in any of these cases are no better than 50-50 and probably should more realistically be called slight.***

"After two exhaustive and lengthy investigations by two agencies of the government, there are no findings of any misconduct by any of the defendants which would show, even prima facie, a violation of the anti-trust laws." (*State of West Virginia* v. *Chas. Pfizer & Co., Inc., et al.*, 314 F.Supp. 710, 741 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied sub nom., Cotler Drugs Inc.* v. *Chas. Pfizer & Co., Inc.*, 92 S.Ct. 81 (1971))

Bristol's Special Role in Tetracycline

When Bristol entered the tetracycline market in May 1954 it was *not* as a result of any agreement with Pfizer and Cyanamid. Quite the contrary. Bristol was then engaged in hotly fought Patent Office proceedings with both Pfizer and Cyanamid. And the fighting soon got even hotter. In September 1954 Cyanamid brought a patent infringement suit against Bristol seeking to enjoin the manufacture and sale of tetracycline. On January 11, 1955 Pfizer brought a similar suit against Bristol for infringement of the tetracycline patent which had issued that very day. The government asserted at the trial that the activities of Pfizer and Cyanamid were for the purpose of "stifling their then principal competitor, Bristol" (1119a).

But Bristol was not stifled. It was successful in breaking into the tetracycline market and bringing in its bulk customers, Squibb and Upjohn, as well.

Bristol acquired no basic patent rights in the tetracycline field and never brought any suit against anyone for infringement of the few improvement patents it had on processes for making tetracycline (4292a-93a). Although the government originally charged Bristol with improper

activities in the Patent Office, the trial court, with acquiescence by the government prosecutor, withdrew these charges from the jury's consideration (4525a-26a, 4971a).*

Bristol before Tetracycline

Bristol Laboratories went into production of penicillin in World War II, and within a very few years almost all its manufacturing facilities were devoted to this product. Most of its production was sold as bulk penicillin to other drug manufacturers who compounded and resold it in product forms under their own labels. Bristol had a very small sales force and sales under the Bristol label were insignificant (1831a, 1833a-34a, 2874a-75a, 3004a-05a).

Tetracycline Appears

In the fall of 1953 reports came to Bristol's management through the press that Pfizer and Cyanamid had each independently produced a new broad spectrum antibiotic drug. It was called tetracycline (BX 20, 629; 10436a, 12459a-460a).

It became apparent to Bristol that tetracycline was the same as an antibiotic substance which Bristol itself had discovered in its laboratory in 1950. Bristol had worked with this substance in an attempt to isolate it in pure form, but these attempts were only partially successful (2875a-76a, 3094a-96a). Immediately after the press reports of the Pfizer and Cyanamid discoveries, Bristol embarked upon a crash program, using all its scientific and production capabilities, to get its tetracycline on the market (BX 629, 124592-60a, 1834a-35a, 3008a-09a).

---

* Although the government notes this withdrawal at one point in its brief (G.Br. 53), it improperly includes Bristol in statements elsewhere that there was "evidence that the respondents misled the patent office" (G.Br. 33) and that "defendants cooperated with each other in obtaining a patent monopoly" (G.Br. 88).

The Patent Office Proceedings

On October 19, 1953 Bristol filed an application for a patent on tetracycline and on a process for producing it by direct fermentation (GX 9, 7682a-886a; BX 629, 12459a-60a; 2876a-77a, 3008a-09a). Bristol realized that it would be a latecomer in the Patent Office since it correctly assumed that Pfizer and Cyanamid had filed patent applications on tetracycline prior to their announcements (3008a-09a, 8084a-86a; GX 4-6, 7368a-552a).

On December 28, 1953 the Patent Office declared an interference between Cyanamid and Pfizer, but Bristol was not included. Pfizer and Cyanamid promptly settled this interference with Cyanamid conceding priority to Pfizer (GX 7 at 53 and 54, 7554a-66a; 8527a-60a).

On January 15, 1954 after a rejection of its original application, Bristol filed a continuation-in-part application primarily directed to salts of tetracycline in hopes of provoking another interference to which it would be a party (GX 10 at 86, 7991a). A second interference, on tetracycline hydrochloride (the form in which tetracycline was originally marketed) was declared on March 2, 1954 between Bristol, Pfizer and Cyanamid (1733a-34a; GX 12, 8092a-8301a-1). This interference was bitterly fought. Even Bristol's routine request for an extension of time was opposed by Pfizer and Cyanamid who sought a quick termination of the interference and the elimination of Bristol from the tetracycline market (G.Br. 14-15; GX 12 at 114, 8186a).

In October 1954 the second interference was dissolved by the Patent Examiner, who rejected all applications on the ground that tetracycline must have been inherently co-produced along with Aureomycin in the production processes of Cyanamid's Aureomycin patents. The Examiner rejected the Bristol and Cyanamid applications on other grounds too, but with respect to Pfizer, inherent co-production was the only ground (GX 12 at 431-49, 8281a-99a *et seq.*).

In an effort to prevent Pfizer from overcoming the inherent co-production rejection, Bristol undertook a series of tests to provide scientific proof that samples of old commercial Aureomycin actually contained 2% to 4% of tetracycline. The results of these tests were set forth in an affidavit (the "Taylor affidavit") and filed in the Patent Office on January 3, 1955 (GX 9 at 176-81, 7855a-60a; 2991a-92a).

Despite the Taylor affidavit, however, a tetracycline patent issued to Pfizer on January 11, 1955 (GX 3, 7365a-67a; 3131a-32a).

Bristol's Entry into the Market; Its Decision to Sell to Two Bulk Customers

In May 1954 while the second interference was going on, Bristol commenced sales of tetracycline under its own trade name (1831a, 6693a).

Bristol recognized that it would have difficulty making inroads into the tetracycline market. Its product was identical to Cyanamid's and Pfizer's. Cyanamid had commenced sales in the fall of 1953 and Pfizer had followed in early 1954. Bristol had a tiny sales force, 39 men, while both Pfizer and Cyanamid had sales forces of from 600 to 700 men (BX 23, 10437a-38a; 1818a-19a, 2748a-50a, 2825a-26a, 6693a). In the face of this competition, Bristol's initial impact on the tetracycline market was slight indeed:

TETRACYCLINE SALES TO THE DRUG TRADE

	1954	1955
Cyanamid	$30,202,324	$38,949,574
Pfizer	5,898,708	9,324,642
Bristol	311,487	946,263

(Source: 6848a-50a)

Bristol hoped to increase sales under its own label by increasing its sales force and by developing new and better

tetracycline products. Bristol realized, however, that to finance such a program and to support its plant, it needed to make bulk sales of tetracycline to other drug companies with established names and large sales forces (2894a-96a, 3015a-17a, 3152a). Bristol decided in mid-1954 to sell bulk to two such customers, Squibb and Upjohn (3015a-17a, 3122a-24a). Bristol chose not to sell to more than two customers because to do so would have increased the difficulty of developing a following for the Bristol label. It wished to sell to more than one, however, to avoid absolute dependence on a single customer (GX 191, 8752a-58a; 1817a-19a, 2894a-95a, 2926a, 3015a-16a, 3125a-26a, 3250a).

Bristol's overall marketing plans of selling in bulk to two customers only while endeavoring to increase sales under its own Bristol label were developed in 1954, more than a year prior to the date when Bristol is accused of having joined the alleged conspiracy. Bristol followed these marketing plans without change throughout the entire period covered by the indictment and, as the Government told the jury in its summation, these plans "succeeded brilliantly" (4833a).

Cyanamid's Infringement Suit against Bristol

In September 1954 just after Bristol had contracted to sell bulk tetracycline to Squibb and Upjohn and while the second patent interference was still pending, Cyanamid brought suit against Bristol for infringement of its Aureomycin patent. In December 1954 agreement was reached settling this suit. Formal papers were executed in January 1955. Bristol received an unrestricted license for the manufacture and sale of tetracycline (containing not more than 6% Aureomycin) and agreed to pay a 5% royalty to Cyanamid (GX 72, 8589a-630a; CYX 131, 12483a-85a; 2783a-86a, 2964a-66a, 3019a-20a).

The Pfizer Infringement Litigation against Bristol, Squibb and Upjohn

On the very day the tetracycline patent issued, January 11, 1955, Pfizer sued Bristol, Squibb and Upjohn in Atlanta for infringement (GX 15-17, 8383a-88a; 2374a, 2916a-17a, 3021a-22a, 3087a-88a).

Loss of this suit would have put Bristol out of business (3048a). Bristol, Squibb and Upjohn quickly filed suits in the District Court for the Southern District of New York for declaratory judgments against Pfizer's patent, and at the same time moved in the Georgia court for transfer of the Pfizer infringement suits to New York. This motion was ultimately successful despite strong resistance by Pfizer (GX 18-20, 8389a-95a; 3021a-22a).*

Bristol, Squibb and Upjohn promptly started extensive discovery of Pfizer in an effort to develop all available defenses (3021a-22a, 3088a-89a, 3091a, 3262a-63a; BX 69-75, 542-55, 10439a-68a, 10487a-12419a).

Pfizer had filed affidavits with the Patent Examiner describing experiments undertaken to overcome his rejection of tetracycline product claims on the ground of prior inherent co-production with Aureomycin. In its discovery proceedings in the infringement litigation, Bristol sought to establish that those affidavits were misleading (3087a-92a). Bristol compelled Pfizer to produce numerous documents relating to the experiments, and depositions were taken of several Pfizer scientists, including those who had made the affidavits for the Patent Office (BX 542-55, 10487a-12419a; 4278a-83a). Bristol thought the evidence it obtained was helpful but that it was far from conclusive.

Bristol, of course, could not be certain that it would win the case. Every trial lawyer recognizes that no lawsuit is

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* *Chas. Pfizer & Co., Inc.* v. *Olin Mathieson Chemical Corp.*, 131 F. Supp. 21 (N.D. Ga. 1955), *appeals dismissed*, 225 F.2d 718 (5th Cir. 1955), *petition for mandamus denied sub nom., Ex Parte Chas. Pfizer & Co., Inc.*, 225 F.2d 720 (5th Cir. 1955).

a sure thing. The trial court below acknowledged that the outcome was uncertain and so instructed the jury (3038a, 3048a, 3092a, 3132a, 3134a-35a, 4982a-83a). The reasonableness of Bristol's doubt over the outcome is confirmed by the FTC Hearing Examiner's holding that the Patent Examiner was not in fact misled in issuing the patent and by the government's statement in its bill of particulars in this case that it "will make no • • • claim" that the Pfizer patent was invalid or otherwise unenforceable (TRADE REG. REP. [1961-1963 Transfer Binder] ¶ 15,537; 274a, 293a).

Upjohn's Fear of Losing the Infringement Litigation

Pfizer had asserted a claim for damages against Upjohn for $30,000,000 (GX 26, 8408a-09a). By the fall of 1955 Upjohn had become gravely concerned about the failure to establish a firm and reliable defense to the Pfizer patent (2903a, 3023a-24a, 3204a-05a). Upjohn was especially concerned because in its bulk purchase agreement with Bristol it had agreed to indemnify Bristol against damages for patent infringement.

Upjohn opened negotiations with Pfizer in October 1955 in an effort to obtain a separate settlement (2509a-13a, 3201a-17a). In these negotiations it was proposed that Upjohn purchase a substantial portion of its tetracycline from Pfizer (2510a-13a, 2567a-68a, 3209a-12a, 3215a-16a).

This had serious implications for Bristol. If it lost Upjohn as a bulk customer, it was doubtful that Bristol could operate at a profit. It was too late to obtain any other bulk customer, in view of the certainty that Pfizer would bring an infringement suit against any such customer (2903a, 2908a).

Bristol representatives went to the Upjohn offices in Kalamazoo, Michigan seeking to persuade Upjohn to abandon its efforts to make a separate peace with Pfizer (2903a-

04a, 3228a-34a). Bristol presented in the best possible light the various defenses which could be asserted in order to encourage Upjohn about the outcome of the suit (2913a-14a, 3024a-25a). But Upjohn was not persuaded. Upjohn was willing to abandon its efforts to settle separately with Pfizer only if Bristol would agree to reverse the indemnity provisions of the original bulk purchase agreement under which Upjohn had agreed to hold Bristol harmless against damages for patent infringement (3229a, 3239a-40a). Bristol reluctantly agreed to reversing the indemnity and offered to hold Upjohn harmless from any damages for patent infringement if Upjohn would turn over to Bristol control of the defense of the suit and would purchase its requirements of tetracycline from Bristol for the duration of the litigation plus three years. Upjohn at its option could discontinue purchases from Bristol upon assumption of its pre-existing indemnity obligations. Upjohn agreed to these proposals (GX 108, 8698a-705a; 2920a-23a, 2946a, 3229a-3245a).

As a special inducement to Bristol to seek a prompt settlement with Pfizer, Upjohn offered, despite the reversal of the indemnity, to pay half the cost of settlement and half of any continuing royalty obligation (a) if Bristol could settle with Pfizer within six months, and (b) if such settlement included a license to Upjohn to purchase, use and sell tetracycline to the drug trade (GX 108, 8698a-705a; 2922a, 3027a-28a, 3033a-35a). Bristol was not obliged to seek a license of any kind for Upjohn, but if it obtained a license meeting the description and achieved a settlement within six months, Upjohn was willing to pay half of the settlement costs and of future royalties arising out of Bristol's sales to Upjohn.

Having executed this agreement with Upjohn, Bristol offered a similar agreement to Squibb, and Squibb accepted (GX 83, 8639a-47a; 2893a, 3038a). These agreements with

Upjohn and Squibb were executed on Nov. 3 and Nov. 18, 1955, respectively, a time when, as the government said, "there is nothing about the activities of Bristol that we criticize or say are illegal" (4867a).

The Wiretapping Trial: A Stimulus to Settlement

In September 1955, Schwartz of Bristol received an unexpected call from the New York District Attorney asking him to come to the District Attorney's office about a matter which could not be discussed on the telephone. Schwartz went and learned to his surprise that Bristol's wires had been tapped by a private detective named Broady. The District Attorney would not say at that time who had hired Broady, but because of the hotly contested infringement litigation then pending with Pfizer, Schwartz suspected that Pfizer might be involved (3022a-23a). Broady was tried in November 1955, and convicted in early December.* At the trial it came out that Broady had indeed been retained by Pfizer who paid him $60,000 (2518a).

Immediately after the Broady trial, Schwartz read the transcript of the testimony. He testified that he was "outraged at what had been done to our company" and he instructed Bristol's patent attorney to tell Pfizer's patent attorney that Bristol would interject the wiretapping into the infringement litigation.** Schwartz also told his counsel to send a copy of the Broady transcript to Pfizer, and this was done (2889a).

On the very next day, December 14, 1955, a settlement meeting was held between Schwartz and McKeen and their

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* See *People* v. *Broady*, 6 App. Div. 2d 674 (1st Dep't 1958), *aff'd.*, 5 N. Y. 2d 500 (1959), *cert. denied sub nom., Broady* v. *New York*, 361 U. S. 8 (1959).

** The evidence adduced at the Broady trial gave Bristol a substantial legal weapon in the form of a possible unclean hands defense and the basis of a counterclaim for appropriation of confidential business information if Bristol could prove that the wiretap was authorized by Pfizer. *Mas* v. *Coca-Cola Co.*, 163 F.2d 505, 508 (4th Cir. 1947); J. POMEROY, EQUITY JURISPRUDENCE §§ 402, 404 (5th ed. 1941).

respective patent counsel (2889a-90a). The meeting reconvened the following day. The government claims that Bristol joined the alleged conspiracy at this meeting.

The December 14-15, 1955 Meeting

This is the meeting at which the government contended "Schwartz made that deal with McKeen"—the "deal" being Bristol's supposed agreement or understanding to join the alleged conspiracy already existing between Pfizer and Cyanamid (4867a). But the government did not adduce any direct evidence that such a "deal" was made, and the testimony of the participants at the meeting was to the contrary (2568a-69a, 2734a-35a, 3042a, 3081a-82a).

A settlement of the existing infringement litigation was reached and the terms incorporated in a letter of intent, which was signed by Schwartz and McKeen (GX 95, 8678a-81a, 3038a-41a). This is another of the agreements which the government conceded in its bill of particulars was not in itself illegal (280a). Both Schwartz and McKeen testified categorically, in both general terms and in specifics, that they had not reached any agreement with respect to prices or with respect to manufacturing rights for Squibb and Upjohn, and indeed had not even discussed these matters (2568a-69a, 2734a-35a, 3042a, 3081a-82a).

Prior to the meeting, during the twenty months in which Bristol had been in the tetracycline market, Bristol had set its list prices to match those of Pfizer and Cyanamid and Parke, Davis; following the meeting, it continued the same practice. Prior to the meeting, Bristol had limited its bulk sales to two customers, Squibb and Upjohn; following the meeting, Bristol continued the same practice. Its actions before the meeting were conceded by the government to be legal and not even subject to criticism (4867a). It was these facts plus the absence of any direct evidence

of conspiracy which led the Court of Appeals to observe skeptically:

> "It was thus incumbent upon the government to prove beyond a reasonable doubt by some reverse alchemistic process that acts which had been legal had by some action taken at the December 14-15 meetings been changed merely by continuance into acts thereafter illegal." (426 F.2d at 47; 12610a)

Bristol's Pricing Policies

When Bristol commenced selling tetracycline on May 4, 1954 it set its published prices at the same levels as Cyanamid, Pfizer and Parke, Davis, who were already in the broad spectrum market (1782a, 1850a, 3063a-65a). The government does not contend that Bristol's deliberate decision to charge the same prices as Pfizer, Cyanamid and Parke, Davis was the result of any conspiracy. Squibb entered the market in September 1954 and Upjohn entered in October 1954 (6693a). Generally speaking they also met the existing published prices and, just as in Bristol's case, the government does not contend that their deliberate decision to charge these prices was the result of any conspiracy.

Bristol's policy of meeting the published prices of its competitors never changed. In particular, there was no change in any aspect of its pricing policy in December 1955 (1850a, 3043a, 3069a, 3081a-82a). Both before and after December 14-15, 1955 Bristol met the lowest published price of any competitor to each class of trade (1782a, 1850a, 3043a).

The government contends that inferences of conspiracy may be drawn from the fact that published prices to the retail trade and to private hospitals remained the same for broad spectrum drugs from October 1951 through July 1960 despite shifting sales volume, changes in market shares, and differences in production costs (G. Br. 23-26).

This contention is simplistic in the extreme. It must be remembered that two of those years had gone by before it is claimed that anyone joined the alleged conspiracy and nearly half of the period had gone by before it is claimed that Bristol joined in December 1955.

Moreover, for the twenty months preceding December 1955, Bristol had been setting its prices to meet those of its competitors, and the government not only concedes but asserts that this was legal (4867a). This same twenty months saw the most dramatic reduction in Bristol's production costs for the whole period covered by the indictment. Bristol's production cost for a bottle of 100 250 mg. capsules was $60.25 in May 1954 and was down to $4.91 by December 1954 (GX 934, 10325a). The fact that Bristol made no price change in response to this remarkable change in production cost is not commented on by the government.

No inference of conspiracy arises from Bristol's failure to reduce *its* prices as *its* market share changed. Bristol's market share climbed steadily upwards. Starting from less than 1% in 1954, Bristol worked its way up to 6.8% in 1961 (GX 876, 10245a).

The government also contends that the profitability of broad spectrum antibiotics of the respondents substantially exceeded the profitability of other drug products (G.Br. 27-28, 47). This was simply not true with respect to Bristol. Bristol's gross margins on its tetracycline products did not vary materially from its gross margins on its total product line. The following table is made up from Government Exhibit 838 (9139a-63a), and reflects Bristol's

sales under its own label. It is similar to a calculation made by a witness during the trial (1797a-1800a):

GROSS MARGIN, AFTER FACTORY COST AND ROYALTIES, AS A PERCENTAGE OF SALES

Year	Tetracycline	Total Bristol Line
1957	77.1	71.6
1958	76.7	74.9
1959	77.3	77.9
1960	81.4	80.6

As the table shows, Bristol's gross margin for tetracycline products was lower in the year 1959 than it was for Bristol's total product line. In other years the differences are so slight that by comparison the tetracycline gross margin can be deemed neither unreasonable nor unusual.

Dismissal of the Infringement Suits and Bristol's Filing of the Depositions

The government charged in this case that as one of the "means and methods" of the alleged conspiracy "Bristol suppressed litigation involving the validity of Pfizer's Tetracycline patent" (34a).

The "suppression" of litigation referred to by the government is simply Bristol's settlement of the infringement suits brought by Pfizer. But settlement of litigation is favored by the courts.* And it was entirely proper for Bristol as indemnitor to assume control of the defense and settlement of the cases against Squibb and Upjohn.**

As noted at page 11 above, the trial court in the present case recognized that Bristol could not be certain the in-

* It is established law that settlement of litigation, even with parties who may themselves be members of a previously existing anti-trust conspiracy, does not constitute joining such a conspiracy. *Virtue* v. *Creamery Package Manufacturing Co.*, 227 U. S. 8 (1913); *cf. First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253, 274, n. 13 (1968).

** See 5598a-5600a.

fringement suits could be won. Settlement ensured that Bristol, Squibb and Upjohn could continue to compete. In settling, these defendants did not acknowledge patent validity, their licenses (GX 50, Art. VIII, 8496a-97a; GX51, Art. VII, 8509a-10a; GX52, Art. VII, 8522a-83a) merely expressing the usual licensee estoppel against contesting validity under the law prior to *Lear, Inc.* v. *Adkins,* 395 U. S. 653 (1969).

The government implies that the Pfizer-Bristol license agreement limited Bristol to its two "presently existing bulk customers" (G.Br. 22). This is not the case. In referring to the paragraph of the license which provides for computing royalties to "presently existing bulk customers" (GX 50, p. 9, 8488a), the government overlooked the parallel provision for computing royalties on sales to others (GX 50, p. 10, 8489a). Bristol received an unlimited right "to ferment or otherwise manufacture, make, compound, use and sell" tetracycline (GX 50, p. 4, 8483a).

In his summation to the jury, the government prosecutor admonished: "Never mind what happened before December 1955 as far as Bristol is concerned and this conspiracy is concerned. Keep your eye on what happened after December 1955" (4867a). But it is undisputed that *nothing* happened after December 1955 so far as Bristol's marketing practices were concerned that had not been happening prior to that date. The only significant event following Bristol's settlement with Pfizer was the public filing by Bristol with the court clerk of the depositions that had been taken of the Pfizer witnesses in the infringement suit. These depositions referred to "all of the Pfizer documents used by the government", in the trial of the case at bar, in examining the two Pfizer scientists who had submitted affidavits to the Patent Office on co-production of tetracycline with Aureomycin (except for one tabulation prepared for the 1958 FTC proceeding) (GX 907, 10280a-83a; 4281a-83a).

Bristol's filing of these depositions is totally inconsistent with the accusation that "Bristol suppressed litigation involving the validity of Pfizer's Tetracycline patent" (34a). Bristol placed on public record the evidence which it had unearthed in its defense of the Pfizer suit, making the information available to anyone who wished to follow Bristol's lead in challenging the Pfizer patent (BX 69-75, 10439a-68a; 3048a).

SUMMARY OF ARGUMENT

As stated at the outset, Bristol joins in the Pfizer and Cyanamid briefs. Bristol's separate argument is limited to the holdings of the Court of Appeals with regard to the trial court's charge on (1) the Squibb and Upjohn licenses, and (2) the significance of Bristol's "pre-conspiracy" activities and the date when Bristol is alleged to have joined the conspiracy.

The Licenses to Squibb and Upjohn

In instructing the jury as to the legal effect of the licenses which granted to Squibb and Upjohn certain rights to purchase, use and sell tetracycline to the drug trade, the trial court construed those licenses as containing a "restriction forbidding manufacture" and a "limitation on Squibb and Upjohn, which barred them from manufacturing" (4988a-89a). This instruction was incorrect, as all three judges below recognized and as the government tacitly concedes. There was no "restriction" in those licenses "forbidding manufacture" and no covenant or other provision which "barred" Squibb and Upjohn from manufacturing. The government contends that the Court of Appeals was being "hypertechnical" in holding that this error was prejudicial (G.Br. 79). But the trial court was not merely "technically incorrect" (G.Br. 76); its error went to the heart of the case against Bristol.

The Date when Bristol Allegedly Joined the Conspiracy, and the "Pre-conspiracy" Evidence

The government staked its case against Bristol on the proposition that Bristol entered the alleged conspiracy at a meeting between its president, Schwartz, and Pfizer's president, McKeen, which was held on December 14th and 15th, 1955. The government's bill of particulars specified this meeting as the date of Bristol's entry, and government counsel told the jury that "until the time they made that deal—Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal" (278a, 4867a).

Virtually all of the evidence relating to Bristol concerned its activities prior to the critical meeting. The Court of Appeals held that this circumstance called for "the clearest instructions that the jury should not consider Bristol's part in any of the events prior to Dec. 14-15, 1955 as proof of Bristol's being in any conspiracy" prior to that date (426 F.2d at 47; 12610a). Bristol had requested such instructions and the trial judge had said he would include them in substance (5586a-88a, 4658a-59a). Nevertheless the trial judge failed to do so. And he compounded the error by saying to the jury that "it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges" (4963a-64a).

The Court of Appeals held that this failure to differentiate between the legal and the illegal was prejudicial error (426 F.2d at 47; 12609a-10a).

ARGUMENT

I

The Court of Appeals Correctly Held That Bristol's Right to a Fair Trial Was Prejudiced By the Trial Court's Erroneous Instruction That the Pfizer Licenses to Squibb and Upjohn Barred Them From the Manufacture of Tetracycline.

The Court of Appeals held that Bristol's right to a fair trial by jury in this criminal case was substantially impaired by the trial court's incorrect instruction—an instruction tacitly conceded by the government to be erroneous—that the licenses to Squibb and Upjohn "barred" and "forbid" them from manufacturing tetracycline.

The government in attacking the Court of Appeals for refusing to consider this error harmless to Bristol reverts to the usual generalities: the trial court's error was but "subtle", "putative" and "abstract", "technical", indeed "hypertechnical" (G. Br. 36-37, 76, 79, 90)*; the "lengthy" charge on this subject when seen in its "entirety" and "totality", in light of the entire record, was "fair" and "correct" and portions of it should not be taken "out of context" or "in isolation" and criticized (G.Br. 2, 32, 35, 38, 76); and although Bristol was "vigorously and well represented" at the trial, the case against it was "a strong one",

* Compare *Bollenbach* v. *United States*, 326 U. S. 607, 614-15 (1946): "we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. . . . All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished". See also *Yates* v. *United States*, 354 U. S. 298, 327 (1957): "the very subtlety of these distinctions required the most clear and explicit instructions with reference to them, for they concerned an issue which went to the very heart of the charges".

its conviction "justified" by the evidence, and after all, this is merely an ordinary criminal trial, not one in which "a person's life is at stake" (G.Br. 89, 91). We deal with these matters *infra*.

The government also regresses to a raising of spectres: unless reversed, the Court of Appeals' determination of prejudicial error on this point would not only result in the "unnecessary additional expense" of a new trial (G.Br. 92) but would constitute a "dangerous impediment" to "hospitable" enforcement of the antitrust laws, "impair" their deterrent effect and serve as an "invitation to other companies to risk violations of antitrust laws" (G.Br. 36, 90, 92); would "improperly limit" a trial court's "discretion" to explain matters to a jury "in non-technical terms it can understand" (G.Br. 79); and, indeed, "could become a ground for reversal in any case where organized or complex criminal activity is at issue and the trial is lengthy and routine instructions" are involved, with adverse effect on the morale of prosecutors and on "law and order"* itself (G. Br. 36, 92).

As to the government's dire predictions, it seems to us an affront to this Court to posit such frightening consequences from a straightforward determination that the trial court in this particular case erred in instructing a jury that the legal effect of certain licenses to Squibb and Upjohn (obtained for them from Pfizer by Bristol) was to exclude them from the manufacture of tetracycline, and that this erroneous instruction (in a context where the jury had been told it must convict Bristol on all counts if it found that Bristol had agreed with Pfizer that Squibb and Upjohn would be so excluded) may very well have been

* This phrase appears in the quotation (G. Br. 92) from *United States* v. *Antonelli Fireworks Co., Inc.*, 155 F.2d 631, 641-642 (2d Cir. 1946), *cert. denied*, 329 U. S. 742 (1946), best known for the dissertation in Judge Frank's dissent on prejudicial and harmless error, 155 F.2d at 642-666.

responsible for Bristol's conviction. The trial court's mischaracterization of these licenses as "forbidding" or having "barred" manufacture is plain* and undefended by the government. The resulting prejudice to Bristol, within a narrow framework set for determination of its guilt, is also plain. This error and this prejudice are unique to the present case. It is nonsense to assert that to allow their correction by the Court of Appeals will send out shockwaves adversely affecting the very foundations of antitrust and criminal law enforcement throughout the land.**

The Instruction was Incorrect

The government nowhere defends or discusses the trial court's mischaracterizations of the Squibb and Upjohn licenses as *"forbidding"* and having *"barred"* the manufacture of tetracycline. Instead, it wrongly states:

> "The trial judge referred to the licenses to Squibb and Upjohn as restricted" (G. Br. 35) [and] "the trial court referred to the licenses to Squibb and Upjohn as *'limited'* or *'restricted'*. The court of appeals considered this as technically incorrect and misleading" (G. Br. 76).

Actually, the trial court's incorrect instruction did *not* refer to the Squibb and Upjohn licenses as *"limited"* or *"restricted"*, nor did the Court of Appeals hold that the instruction was erroneous for using these words. What the trial court's instruction did say, and what the Court of Appeals condemned, was that the Squibb and Upjohn licenses each contained a *"restriction* forbidding manufac-

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* Also see *Automatic Radio Co.* v. *Haseltine*, 339 U. S. 827, 836 (1950). And see *infra*, pp. 38-40 regarding the implied rights to manufacture granted to Squibb and Upjohn by their licenses.

** According to the Index to Legal Periodicals, the opinion of the Court of Appeals, handed down more than a year and a half ago, has not been picked up for comment by any law review or other legal periodical.

ture by Squibb and Upjohn" and a *"limitation* on Squibb and Upjohn, which *barred* them from manufacturing" (4988a-89a, 426 F.2d at 45-46; 12607a-08a).

Thus, the government's argument does not deal with what the trial court actually said or with what the Court of Appeals actually held. In defending the propriety of language which was *not* used by the trial court or relied on by the Court of Appeals, the government refers to three earlier instances at the trial where Squibb and Upjohn licenses were referred to as "restricted" or "limited" (G.Br. 78). But this does not justify the trial court's incorrect instruction to the jury that the legal effect of the licenses was affirmatively to restrict Squibb and Upjohn. And this important distinction had been made by Bristol throughout the trial. For example, when the government prosecutor in his closing argument referred to the licenses as "restrict*ing*" Squibb and Upjohn, Bristol's counsel promptly objected (4881a; see also 3103a-04a). During the ensuing colloquy the trial court expressed uncertainty as to the legal effect of the licenses in this regard and said he would "think overnight" what, if anything, he would instruct the jury on this subject (4882a). In the instruction as given, the trial court committed error.

The difference between a "limited" or even a "restricted" license and one containing a "limitation" or "restriction" which bars and forbids, subtle though it may be as a matter of words, is no mere nicety of language but a substantive distinction between (a) a license granting rights which are "limited" in the sense they constitute less than complete immunity from suit for any manufacture, use or sale of the patented invention and (b) a license so limited which goes further (as by a covenant) and contains or constitutes an actual "limitation" or "restriction" upon the licensee's conduct in the unlicensed area. With the first type of license, the license would not bar the licensee from engaging in unlicensed activities (while risking an infringement suit, a

risk he may be willing to take*); the second type of license, on the other hand, would constitute such a bar. The first type of license does not purport to inhibit the licensee's freedom of action to do what he could do before; the second type does so inhibit, and indeed may be frowned upon by a court even if unilaterally granted.

The government's failure to come to grips with the critical words used in the instruction: "barred", "forbidding", "limitation", "restriction", its misstatements that the trial court merely referred to the licenses as "limited" and "restricted", and its related disingenuous allusions to the licenses as "non-manufacturing licenses" (G.Br. 6, 23, 38, 73),** cannot mask the fact that the instruction as actually given undoubtedly conveyed to the jury—as it was intended to convey***—a ruling that the licenses themselves precluded manufacture. But this interpretation was in-

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* Even prior to *Lear, Inc.* v. *Adkins*, 395 U. S. 653 (1969), the existence of his limited license would not have estopped the licensee from contesting validity in an infringement suit against his activities in the unlicensed area. See *e.g. Davis* v. *Buck-Jackson Corp.*, 230 F.2d 655 (4th Cir. 1956), *cert. denied*, 351 U. S. 950 (1956), where the earlier authorities are collected.

** At G.Br. 6 the government improperly inserts the words "and not manufacture" after the word "sale" in a "summary" of the indictment's alleged "means and method" that "Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of tetracycline products" (35a). At G.Br. 23, after stating that Upjohn and Squibb received licenses to purchase, use and sell, the government states "They could not manufacture..."

*** The argument on exceptions to the charge included the following: "Mr. Clark: . . . In discussing the licenses that Squibb and Upjohn ultimately got, I believe your Honor told the jury that those licenses precluded or barred Upjohn and Squibb from manufacturing. The Court: I said they did contractually preclude or at least I meant to say it. Mr. Clark: But we except to that" (5019a). At the close of argument on all of the exceptions, although the trial judge stated "the one thing that gave me pause" was his treatment of the licenses to Squibb and Upjohn and that "part of what developed" for him from the argument on the point was "on this one, it is pos-

correct, as the licenses show (GX 51, 52, 8501a-26a) and as found by the Court of Appeals:

> "The agreements, however, disclose that there was nothing therein which barred them [Upjohn and Squibb] from manufacturing or which forbid manufacture. In fact there were no restrictive phrases whatsoever." (426 F.2d at 45-46; 12607a)

Even the dissenting opinion recognized:

> "The instruction might have been construed by the jury to mean that but for the restriction Squibb and Upjohn would have had the right to manufacture tetracycline, whereas in fact there would have had to be a specific grant of permission." (426 F.2d at 50; 12615a)

The Instruction was Misleading and Prejudicial

The opinion of the Court of Appeals sets forth (irrefutably we believe) how the foregoing error in the trial court's instruction on the Squibb and Upjohn licenses undoubtedly misled the jury on a point which very well may have been crucial to Bristol's conviction on all counts. The dissenting opinion, after conceding the instruction erroneous, goes on to say

> "It seems to me quite *unlikely* that the jury was *seriously* misled by this instruction." (426 F.2d at 50; 12615a)

With deference, we submit that it could not have been other than "serious" to Bristol for the jury to have been misled at all by this error. The error related to an issue at the very heart of the indictment's charge that Bristol criminally conspired to exclude Squibb and Upjohn from

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sible . . . that I may have slipped", he decided not to alter or supplement the instructions as given (5049a). Contrary to the impression given at G.Br. 38, n. 19, the opinion of the trial court (6446a-73a, 281 F. Supp. 837) denying defendants' motion for acquittal or a new trial, included no discussion of objections to the instructions relating to the Squibb and Upjohn licenses, although those objections were made briefed and argued by Bristol (6326a, 6342a-47a, 5105a-09a, 5118a-19a).

the manufacture of tetracycline. The jury was instructed, irrespective of the price-fixing charges, that it must convict Bristol on all counts if it concluded that Bristol had agreed with Pfizer, on December 14-15, 1955, to exclude Squibb and Upjohn from the manufacture of tetracycline 4955a-56a, 4960a, 4966a, 4999a). The error thus occurred in a very narrow area which the instruction itself stressed as "vital" and "critical" to the issue of Bristol's guilt (4988a-89a). And the error blazed so direct a path to Bristol's conviction that it cannot fairly be denied that the jury may have taken that path. As pointed out by the Court of Appeals:

> "The court, having incorrectly assumed that this bar existed, submitted to the jury the question of 'whether the limitation on Squibb and Upjohn, which barred them from manufacturing . . . was an agreed objective between Bristol and Pfizer in the issuance of that license.' The jury, in being so advised, might well have concluded that the December 1955 Bristol-Pfizer agreement was, in fact, a bar which violated the antitrust laws and that Bristol and Pfizer had collaborated in imposing restrictions which otherwise did not exist.
>
> "Furthermore, the term 'restriction' was used alternately to characterize the licenses and to describe what Pfizer and Bristol were forbidden to agree on. [*] The net result was that the charge might be read to contain this syllogism: Pfizer and Bristol were forbidden to agree to restrict licenses to others; the licenses given imposed restrictions on Squibb and Upjohn; Pfizer and Bristol agreed on those licenses; therefore, Pfizer and Bristol did what they were forbidden to do." (426 F.2d at 46; 12607a-08a)

Clearly on this "nerve center issue"** it cannot be assumed that the jury had the competence, the superior wis-

* See also 4960a, 4966-67a, 4988a. The instruction included a similar alternate use of the term "bar" (4955a, 4988a-89a).

** *King* v. *United States*, 372 F.2d 383, 395 (D.C. Cir. 1967).

dom or the incentive to correct or disregard the trial court's erroneous instruction on the legal effect of the Squibb and Upjohn licenses. Nor can it be assumed that the jury was dissuaded from reasoning along the lines noted by the Court of Appeals by the fact it also received an abstract instruction (quoted at G. Br. 74-76) that the government did not claim any of the licenses or other written agreements in the case was, alone or in combination, unlawful without reference to other facts. The jury undoubtedly was unaffected by this abstruse disclaimer, which the government itself ignored in arguing to the court and jury that in effect the written documents themselves show Bristol's guilt (*e.g.* 1132a-34a, 1492a-93a, 4531a-33a, 4877a-78a).*

On the allegation that Bristol conspired with Pfizer to keep Squibb and Upjohn from manufacturing tetracycline, the question for the jury was not whether Schwartz asked McKeen to grant to Squibb and Upjohn, and Pfizer agreed to grant, the license rights they actually received. The law does not condemn an agreement between a patent owner and a licensee which *provides* for the grant of license rights to others, even if less than a full bundle of rights, and the government does not so contend. The December 15, 1955 settlement memorandum includes such an agreement with respect to the licenses to Squibb and Upjohn,

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* In his summation to the jury, the prosecutor, after quoting that portion of the December 15, 1955 Bristol-Pfizer agreement which provided for the Squibb and Upjohn licenses, stated *"This* is Schwartz, through Pfizer, *putting into effect* the *restrictive* arrangement that he has in this November 3, 1955 agreement" (4878a).

The government continues, albeit more tacitly, to make this same argument in its present brief before this Court. See *e.g.* G.Br. 21, 34-35, in addition to the references noted *supra* to "non-manufacturing licenses". Lip service to the "disclaimer" and to the written agreements being only part of "the circumstantial evidence" of conspiracy to exclude also continues to be given (G.Br. 35). But the underlying argument remains that the November 1955, December 15, 1955 and March 31, 1956 agreements themselves prove that Bristol conspired to exclude.

and the government concedes this document is lawful on its face (GX95, 3038a-41a; B.P. ¶ 7, 272a, 280a).

The question for the jury was a critically different one: whether Schwartz and McKeen had a further agreement or understanding that Squibb and Upjohn would be barred from the manufacture of tetracycline (as by an agreement that Pfizer would not offer Squibb or Upjohn the license right to manufacture and would refuse this right if either requested it).* This question was answered for the jury by the trial court's erroneous ruling that the licenses which McKeen agreed with Schwartz to grant to Squibb and Upjohn barred them from manufacture, the following portion of the instruction, as the Court of Appeals noted (426 F.2d at 45-46), containing wholly within itself all the jury needed for conviction:

> "The *critical inquiry* on this score is whether the *limitation* on Squibb and Upjohn, which *barred them from manufacturing,* was the particular objective of Bristol and was *an agreed objective* between Bristol and Pfizer in the issuance of that license." (4988a-89a)

Singularly apposite here are these statements in *Bollenbach* v. *United States,* 326 U.S. 607, 612-614 (1946):

> "'In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial

* This difference, although critical, was subtle enough to require careful, unblurred discernment on the part of the jury. Because of this, especially in view of the length and complexity of the trial, and the prosecutor's mischaracterizations of the written agreements noted *supra,* Bristol in its Request No. 32A asked the trial court to point out this difference in its charge (5597a). The request was denied (4699a), and denied again when renewed during exceptions to the charge (5017a-21a). The government's brief, although noting (G. Br. 74) that the Court of Appeals criticized the trial court's failure to charge the jury as requested (426 F.2d at 45), and defending in a heading that failure (G. Br. 79), does not discuss the correctness of the request to charge. In any event, the Court of Appeals, although referring to this failure to charge, bottomed its opinion on the plain error in the instruction as actually given.

for the purpose of assuring its proper conduct and of determining questions of law.' *Quercia* v. *United States*, 289 U.S. 466, 469. 'The influence of the trial judge on the jury is necessarily and properly of great weight.' *Starr* v. *United States*, 153 U.S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge.[*]

". . . Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.

". . . A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in

* On the inadequacy of general instructions to the jury where serious error exists on a vital point, see also *Bruton* v. *United States*, 391 U.S. 123, 129 (1968), which quotes Justice Jackson's famed statement in his concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949). Recent Second Circuit authority to the same effect includes *United States* v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970); *United States* v. *Hughes*, 389 F.2d 535, 537 (2d Cir. 1968), *cert. denied*, 396 U.S. 867 (1969); *United States* v. *Persico*, 349 F.2d 6, 10 (2d Cir. 1965); *United States* v. *Kelly*, 349 F.2d 720, 756-58 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). Other cases pertinent here which stress the trial court's obligation to give the jury complete, clear and accurate legal guidance on the evidence and issues before it include *United States* v. *Casale Car Leasing, Inc.*, 385 F.2d 707, 710-11 (2d Cir. 1967); *United States* v. *Borelli*, 336 F.2d 376, 386, n.4 (2d Cir. 1964), *cert. denied sub nom.*, *Cinquegrano* v. *United States*, 379 U.S. 960 (1965); *United States* v. *Christmann*, 298 F.2d 651, 653-54 (2d Cir. 1962).

fact he misguides them. To do so would transfer to the jury the judge's function in giving the law".*

In the present case there can be no doubt that the trial court's instructions were given great weight by the jury. Shortly after it retired to deliberate, the jury requested copies of the charge and twelve copies were furnished (5051a, 5060a-61a, 5064a, 7345a-46a). The jury's requests for exhibits and testimony cited the trial court's instructions by page and line (5071a, 7348a-49a). Following the verdict, the jurors made a special request that they be permitted to take home with them their copies of the charge, and this permission was granted (5077a).

The trial court's erroneous legal interpretation of the licenses to Squibb and Upjohn as barring manufacture provided a linchpin for Bristol's conviction by the jury in a case in which the majority of the Court of Appeals, in denying rehearing, said they "incline to the view"

* The government's statements (G. Br. 89) that error by the trial court should be held harmless because the case against Bristol was "strong" and its conviction "justified" by the evidence, are not only refuted by the facts, as discussed elsewhere in this brief, but also by *Bollenbach:* "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts. . . . From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (326 U.S. at 614-615) See also *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946). In the Second Circuit see *e.g. United States* v. *Guglielmini*, 384 F.2d 602, 604 (2d Cir. 1967) where the Court reversed despite the fact it believed "The proof amply supported the verdicts of guilty".

that there "was insufficient evidence to warrant submission to the jury" of the conspiracy-to-exclude charge against Bristol (437 F.2d at 959).* Certainly, the Court of Appeals correctly concluded there was at least grave doubt that the jury's conviction of Bristol was not substantially influenced by the erroneous instruction. Indeed, this instruction may have led directly to that conviction. But "grave doubt" is enough, in this criminal case, to have warranted the Court of Appeals in setting aside that conviction and ordering a new trial. *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946), *Krulewitch* v. *United States*, 336 U.S. 440, 444-445 (1949).**

The government's brief implies that because this is an antitrust case involving large pharmaceutical companies the standards for review should be slackened. But the constitutional right to a fair trial belongs to all. It would be a sorry day for this country if courts embraced the view that a lesser standard of fairness and justice should be applied to certain defendants in criminal cases.

We are confident this Court will agree and will commend, rather than criticize the Court of Appeals for its "punctiliousness" (G.Br. 37) toward insuring a fair trial in this criminal case, as well as in others.***

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* See *supra*, pp. 3-5, for a discussion of (a) the earlier FTC proceedings, where all charges against Bristol were dismissed, on substantially identical evidence, and (b) the damage suit settlement proceedings, in which Judge Wyatt commented, in affirming the settlements, on plaintiffs' "slight" chances of recovery.

** Any right to a new trial based on this prejudicial error is of course unaffected by the fact that the jury also was asked to consider Bristol's guilt or innocence on the price-fixing charges, since it is impossible to say the jury did not base its conviction of Bristol solely on a determination of conspiring to exclude. Compare *Nash* v. *United States*, 229 U.S. 373, 379-380 (1913), *Yates* v. *United States*, 354 U.S. 298, 312 (1957).

*** The right to a fair trial should be protected for Bristol "so that it may continue to be available for all", *United States* v. *Hughes*, 389 F.2d 535, 537 (2d Cir. 1968), *cert denied*, 396 U.S. 867 (1969).

Other Errors in the Trial Court's Instructions Relating to the Squibb and Upjohn Licenses

At the trial the government contended that Squibb and Upjohn really wanted manufacturing rights in the licenses they received but that Bristol, desirous of keeping them as captive customers for bulk tetracycline, did not want them to get any such rights and arranged matters in the November 1955 agreements and with Pfizer on December 15, 1955, so that they could not. The government also contended that Bristol did not want Squibb and Upjohn to have any right to sell bulk tetracycline themselves, and arranged to deny them this as well. The same contentions are made, in much smaller compass, in the government's present brief (G.Br. 20-21, 23, 34-35).

Bristol argued in the Court of Appeals that the trial court had committed errors in connection with these aspects of the case, but the Court of Appeals apparently did not reach or consider these arguments in view of its decision that the trial court's misinterpretation of the Squibb and Upjohn licenses might in itself have led the jury to convict. Because these other aspects are still the subject of contentions in the government's brief, however, we believe a discussion of three of them will be helpful to the Court in its review.

Evaluation of these contentions requires an understanding of what Squibb and Upjohn actually wanted in this regard, what "arrangements" were made and what rights they actually received or otherwise had—all part of a circumstantial framework for determining Bristol's guilt or innocence of the indictment's charges of conspiracy to exclude Squibb and Upjohn from manufacturing and from selling bulk.

The Rights Desired by Upjohn

The instructions to the jury included the following:

> "You may consider the evidence that shortly before December 1955 Upjohn sought from Pfizer a license

to manufacture tetracycline, but that Upjohn and Squibb received in the settlement only licenses to compound, use and sell products, so that they had to have some manufacturer as a source of the bulk material." (4985a)

The trial court in giving these instructions, and in refusing requests for correction, committed the following errors:

(1) It singled out an item of evidence, favorable to the government's position against Bristol relating to the issue of Upjohn's interest in manufacturing rights in a possible settlement, and not only failed to balance the item so stressed with any of the other undisputed evidence on the point favorable to Bristol's position but refused to call the jury's attention to a disclaimer by the government in the bill of particulars which contradicted the inference prejudicial to Bristol which the selected item suggested.

(2) Its reference to the single item of evidence was based on the trial court's own interpretation of that evidence, when the interpretation should have been left to the jury.

At the October 4, 1955 meeting between Gilmore of Upjohn and McKeen, Gilmore made a settlement proposal—rejected by McKeen—which included a license to Upjohn "to make, use, sell or have made for us" (GX 423, 8865a-88a; 3204a-06a). Gilmore testified that "have made for us" meant "I suppose just what it says, have somebody else make it for us, maybe we'd have Bristol make it" (3206a). There is no evidence that Upjohn was in any position in late 1955, from the standpoint of research, organisms, know-how, production facilities, etc., to manufacture tetracycline commercially itself (3192a, 3241a-43a; cf. 3028a-29a).

The interpretation of this phrase as to whether Gilmore wanted at that time *either* the right to make *or* the right to "have made for us", was a question for the jury. Gilmore

was not questioned on this point. And if the "either-or" interpretation was the correct one, as we contend it was, then Bristol obtained from Pfizer for Upjohn all that Upjohn desired (especially in view of the implied rights to manufacture granted by the Upjohn license, as noted *infra*). During argument on Bristol's motion for acquittal at the close of the government's case, the trial court stated that *it* read the phrase "to make, use, sell or have made for us" as referring to a license which included *both* the right to make *and* the right to have made for the licensee, a "license to cover us whichever way we want to do it" (4549a). It was, in our view, beyond fair comment, an invasion of the jury's province and prejudicial to Bristol for the trial court in its instruction to stress to the jury his own conclusory interpretation that "Upjohn sought from Pfizer a license to manufacture" and then to refuse to refer, after timely exception by Bristol (5013a-14a), to the precise words used by Gilmore.

Furthermore (and apart from whether "shortly before" fairly characterizes an event ten weeks earlier than the Schwartz-McKeen meeting of December 14-15, 1955), it was also unfair to Bristol for the trial court to refer to Gilmore's statements at the October 4, 1955 meeting without mentioning (a) other facts intervening between those statements and the December 14-15, 1955 meeting, and (b) the government's disclaimer in the bill of particulars that Upjohn had requested Bristol to obtain in any settlement a license for Upjohn which included the right to manufacture.

The trial court's "shortly before" statement was prejudicial to Bristol because it implied that at the time of the Schwartz-McKeen meeting on December 14-15, 1955 Upjohn's interest in full manufacturing rights was an active one known to Schwartz. The jury should have been reminded of other facts tending to show that Upjohn was

no longer interested—if it ever had been*—in obtaining such manufacturing rights, and thus tending to show the unlikelihood of any agreement between Bristol and Pfizer to deprive Upjohn of such rights.

As noted above, pp. 11-13 after Upjohn in October 1955 had opened separate settlement talks with Pfizer, Bristol's representatives went to Upjohn's offices in Kalamazoo for discussions which resulted in the bulk sales agreement of November 3, 1955 (GX 108; 8698a-705a). This agreement assured Upjohn of a source of supply of tetracycline for the duration of the Pfizer litigation plus a period of three years. Upjohn was relieved from the obligation to indemnify Bristol, and Bristol in turn agreed to indemnify Upjohn with respect to damages for infringement of the Pfizer patent.

The agreement also provided that if Bristol obtained a settlement of the litigation within six months, Upjohn would pay half of the cost of settlement if the settlement included a license to Upjohn which "may, however, be limited to your right to purchase, use and sell tetracycline to the drug trade" (GX 108 ¶ G, 8703a). The agreement did not obligate Bristol to get this or any license for Upjohn in any settlement, the only consequence of Upjohn not getting such a license being that Bristol would have to pay all the settlement costs itself with respect to sales to Upjohn.

The government conceded in its bill of particulars that this agreement between Bristol and Upjohn was not illegal without reference to other facts (280a-81a). The propriety of the agreement was further conceded when the government stated expressly that there were no actions which Bristol had taken prior to December 14-15, 1955 "that we criticize or say are illegal" (4866a-67a). And the government expressly disclaimed in its bill of particulars that

* Compare the statements in the January 1955 letter from Upjohn's counsel to Gilmore, noted at G. Br. 20. But see the later letter in February 1956 (PX 607, 12529a; 3240a-41a).

Upjohn ever asked Bristol to obtain manufacturing rights for it (295a-96a, 302a).

In December 1955 under the stimulus of the wiretapping incident, Bristol arranged a meeting with Pfizer. When Schwartz asked that Upjohn and Squibb be granted the licenses defined in the November 1955 contracts, McKeen was reluctant to grant even the licenses requested and did so only at Schwartz' insistence (3041a-42a).

Following the December 14-15, 1955 meeting, Upjohn, as shown by its internal February 1, 1956 letter, confirmed that its interest was in, and that it was satisfied with, a license to purchase, use and sell when McKeen phoned in late January 1956 (PX 607, 12529a; 3240a-41a). It again confirmed this when it signed the formal settlement and license agreements on March 28, 1956. The record shows no request thereafter by Upjohn to Pfizer seeking the full right to make, although Upjohn was perfectly free to make such a request if it had desired to do so.

The trial court made no mention of any of the foregoing events which took place between Upjohn's October 1955 meeting with Pfizer and the receipt of its license in March 1956. Nor did it mention the government's concession in the bill of particulars that Upjohn never requested Bristol to obtain manufacturing rights. On three occasions the trial court refused Bristol's request to tell the jury of this disclaimer.*

By mischaracterizing and mentioning only Upjohn's October 1955 request and the license Upjohn received from Pfizer, and by omitting any reference to the intervening events and to the significant government concessions, the trial court committed prejudicial error.

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* When it rejected Bristol's Request to Charge No. 32A (4599a, 5594a-600a), during the argument on exceptions to the charge (5014a-17a, 5049a), and after the jury during its deliberations had asked for copies of the indictment, bill of particulars and instructions, receiving only the instructions (5069a-70a; see 5051a, 5058a-59a).

The Implied Rights Received by Squibb and Upjohn

The erroneous intimation in the instruction that Upjohn received in the settlement a license which was less than it wanted, took on added prejudicial weight from the trial court's refusal to instruct the jury that, so far as Pfizer's patent was concerned, the license Upjohn (and Squibb) received (1) allowed it to purchase bulk tetracycline abroad (in a country such as Italy where Pfizer had no patent on tetracycline) and import it for compounding, use and sale here,* and (2) gave Upjohn (and Squibb) the right to make bulk tetracycline in this country itself, or to have bulk tetracycline made for it here by someone other than Pfizer or a licensed manufacturer such as Bristol, if necessary to enable it to exploit the rights it had received under the license. These legal effects of the license were set forth in Bristol's Request to Charge No. 32A (5594a-600a), rejected by the trial court before charging the jury (4699a) and again during argument on exceptions to the charge (5019a-21a, 5049a). When Bristol, during the argument on exceptions, referred to Upjohn's implied right to make, if necessary, the trial court stated "I have never heard that suggestion until this minute"; Bristol pointed out that the law had been set forth in its Request to Charge No. 32A, which the trial court had previously denied (5019a-20a).

This principle that in limited licenses such as those granted to Squibb and Upjohn there is an implied or "contingent" right to make, or have made, if necessary, has

* Tetracycline from Italy was being imported into this country for sale to the government as early as 1959 (3545a-48a, 6932a-36a). The November 1955 requirements contracts Squibb and Upjohn had with Bristol (GX 83, 108; 8639a-47a, 8698a-705a) were to expire in March 1959, three years after formal settlement of the litigation. Schwartz testified that at the time of discussions with Upjohn regarding the license to purchase, use and sell referred to in the November 1955 agreement, his understanding was that such a license would permit Upjohn to purchase tetracycline from others and import it (3000a-01a).

long been well established. See *e.g. Dunkley Co.* v. *California Packing Corporation*, 277 Fed. 996, 998 (2d Cir. 1921), *cert. denied*, 257 U. S. 644 (1921); *Illingworth* v. *Spaulding*, 43 Fed. 827, 831 (D.N.J. 1890); *Steam Stone Cutter Co.* v. *Shortsleeves*, 22 Fed. Cas. 1168 (No. 13,334) (C.C.D. Vt. 1879); 4 DELLER'S WALKER ON PATENTS, 2d ed., § 388 (1965). In the *Steam Stone Cutter* case, the Court stated (pp. 1168-69):

> "It is a maxim of the common law, that any one granting a thing impliedly grants that also without which the thing expressly granted cannot be had; or, as expressed more pertinently to the precise question here by Twysden, J., in Pomfret v. Ricroft, 1 Saund. 321, 'when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use'. [citations omitted] The foundation of it is the presumed intention of the grantor to make the grant effectual. [citations omitted] And it is as applicable to grants of rights under patents, whether assignments or mere licenses, as to any other subject, where the true intent is sought for. Curt. Pat. § 214. This grant by Wardwell would not pass anything at all, unless the grantee could, in some way, procure the machines. It is suggested, in argument, that the intention was that they should be procured of the patentee, or from a manufacturer under him. But no grant of any right to use such machine would be necessary. The sale of it would carry the right. . . .
>
> "As this grant is now viewed, the right to make machines for the use expressly granted passed, and this would include the right to procure them to be made, and cover the making them by the one procured to make them."

Clearly, the government's position that Bristol conspired with Pfizer to bar Upjohn and Squibb from making tetracycline and from buying tetracycline in bulk elsewhere than from Bristol would have been undercut in the eyes of

the jury if it had been instructed on the law, as it should have been, that, so far as Pfizer's patent was concerned, the license rights Upjohn and Squibb received allowed them to import tetracycline from abroad and gave them certain rights to make or have made for them in this country if Bristol (and Pfizer and Cyanamid) was unable or unwilling to sell them bulk tetracycline, or would do so only at an exorbitant price.*

The Rights Squibb and Upjohn Had to Sell Bulk Purchased from Bristol

In another respect as well the trial court refused to give proper instructions as to the legal principles relevant to Pfizer's licenses to Squibb and Upjohn. Once Bristol became a licensed manufacturer, Squibb and Upjohn needed no licenses to buy Bristol's tetracycline. Such purchases were free of the patent, and Squibb and Upjohn could do as they pleased with the bulk tetracycline they bought, reselling it in bulk if they chose to.** See *e.g. United States v. Univis Lens Co.*, 316 U. S. 241, 250-252 (1942). But the trial court refused to charge the jury to this effect, as it was asked to do in Bristol's Request to Charge No. 32A (4699a; 5594a-600a).

Had the trial court correctly instructed the jury on the law and the legal effect of the licenses, it would have undercut the government's argument to the jury that Bristol,

* In the *Illingworth* case, *supra*, the Court quoted from *Woodworth v. Curtis*, 30 Fed. Cas. 565 (No. 18,013) (C.C.D. Mass. 1847), where the license was "to use one machine in Boston", as follows: "The first question is, did this involve the right to make or procure to be made the machine thus permitted to be used? I think it did. Otherwise the whole license might be defeated, if the grantor refused to make for him at all, or to make at any but an exorbitant price, or demanded another consideration for a right in the grantee to make for himself, under a license like this."

** The FTC held ". . . Squibb and Upjohn did not need licenses from Pfizer to sell tetracycline purchased from Bristol". *Matter of American Cyanamid Co. et al*, No. 7211, 63 FTC 1747, 1783 (1963) (Commission's Finding No. 27).

through Pfizer, unlawfully imposed on Squibb and Upjohn licenses which restricted "their otherwise free right to sell in bulk" and prevented them from reselling bulk tetracycline purchased from Bristol (*e.g.* 4880a-83a).

Here again, as in its statements to the jury that the Squibb and Upjohn licenses "barred" manufacture, the trial court misapprehended the legal effect of these licenses. The licenses *granted* certain rights to the licensees, and interfered in no way with the licensee's right to sell bulk tetracycline from an authorized source such as Bristol.

Here again also, the trial court's error in this regard unfairly prejudiced Bristol in the eyes of the jury with respect to the government's charges.

II

The Court of Appeals Correctly Held That There Was Prejudicial Error in the Trial Court's Failure to Instruct the Jury Regarding Bristol's "Pre-conspiracy" Conduct and in the Misleading Instruction Given Concerning the Date of Bristol's Alleged Entry.

As the Court of Appeals observed, all of the means and methods in the indictment referring to Bristol "preceded the date Bristol is alleged to have entered the conspiracy" (426 F.2d at 47; 12609a). The Court of Appeals said that the harmful effect upon Bristol of the proof of these alleged means and methods "could only have been minimized by the clearest instructions that the jury should not consider Bristol's part in any of the events prior to December 14-15, 1955 as proof of Bristol's being in any conspiracy" prior to that date* (426 F.2d at 47; 12609a-10a). The fail-

* The government contends that to "instruct the jury that Bristol's pre-December 1955 conduct could not be considered as proof of Bristol's being in *'any'* conspiracy would be a clear departure from established principles" (G. Br. at 83 et seq.). It adds that "Bristol

ure of the trial court to give such instructions, plus the erroneous instructions actually given that " 'it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges,' could well have caused the jury to believe that Bristol was involved in a conspiracy long before December 14-15, 1955" (426 F.2d at 47; 12609a-10a).

Furthermore, a "comprehensive charge as to these prior events became all the more important because the government, in effect, had put its stamp of legality on [Bristol's] identity of price [with Pfizer and Cyanamid] and restricted bulk sales [to Squibb and Upjohn only]" prior to December 14-15, 1955, and:

> "It was thus incumbent upon the government to prove beyond a reasonable doubt by some reverse alchemistic process that acts which had been legal had by some action taken at the December 14-15 meetings been changed merely by continuance into acts thereafter illegal." (*Ibid*)

The Court of Appeals noted that the proof of Bristol's alleged entry into the conspiracy was entirely circumstantial and that the government's hypothesis of conspiracy was directly contrary to the direct testimony of the witnesses

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never requested that the jury be told, as the court of appeals would require, that it could not consider Bristol's pre-December 1955 conduct 'as proof of Bristol's being in *any* conspiracy'" (G.Br. 84). And it proceeds to argue that evidence of pre-conspiracy conduct is relevant to motive, intent and design, a point we deal with at pages 48-49, *infra*.

The short and complete answer to these contentions is that when read fairly and in context, the opinion of the Court of Appeals says in effect that the jury should have been told that it could not consider Bristol's part in events prior to December 14-15, 1955 as proof of Bristol's being in any conspiracy *prior to that date*. It is an undisputed matter of record that Bristol, by certain of its Requests to Charge, sought instructions by the trial court that the jury could not consider evidence of events prior to December 14-15, 1955 as proof that Bristol joined any conspiracy *"prior to that date."* See, *e.g.*, Bristol Request No. 7B (5587a).

and the documents evidencing their agreement. In such a situation, the Court of Appeals said that precise instructions were essential:

> "There was no direct proof of conspiracy to be found in the Schwartz-McKeen versions as developed extensively on direct and cross-examination relating to the December 14-15, 1955 meetings. Nothing illegal is to be found in the written agreements embodying the understandings reached. But, in a case so wholly dependent for conviction upon the jury's drawing of inferences in direct contrast to the statements of the witnesses present and the documents evidencing their agreement, the importance of instructions cannot be overemphasized." 426 F.2d at 47; 12610a.

Although disclaiming any actual knowledge of "what factors were decisive in the jury's collective mind in reaching their verdict", the Court of Appeals held that "failure to differentiate between the legal and the illegal was prejudicial error." (*Ibid*)

The Court of Appeals' Determination of Prejudicial Error is in Accordance with Well-Settled Principles

The failure to instruct on a basic issue in a precise and understandable manner that clearly differentiates between the legal and illegal is prejudicial error. *Yates* v. *United States,* 354 U. S. 298, 324-327 (1957). Especially is this true where the evidence in the record is itself equivocal:

> ". . . the very subtlety of these distinctions [between advocacy or teaching of abstract doctrines (the legal) and advocating the overthrow of the government by force and violence (the illegal)] required the most clear and explicit instructions with reference to them, for they concerned an issue which went to the very heart of the charges against these petitioners. The need for precise and understandable instructions on this issue is further emphasized by the equivocal

> character of the evidence in this record . . . Particularly in light of this record, we must regard the trial court's charge in this respect as furnishing wholly inadequate guidance to the jury on this central point in the case. We cannot allow a conviction to stand on such 'an equivocal direction to the jury on a basic issue' *Bollenbach* v. *United States*, 326 U. S. 607, 613." *Yates* v. *United States, supra*, at 327.

Particularly in the context of a complicated conspiracy case such as this it cannot be said with fair assurance that the failure to include such unequivocal and correct instructions in the charge did not sway the jury. *Kotteakos* v. *United States*, 328 U. S. 750 (1946).

There is nothing novel in the insistence by the Court of Appeals on the "clearest instructions" regarding Bristol's "pre-conspiracy" activities. This is merely an application of "The classic rule to be applied in these joint conspiracy trials . . . stated by Mr. Justice Rutledge in Blumenthal v. United States, 1947, 332 U. S. 539, 559-560 . . ." *United States* v. *Kelly*, 349 F.2d 720, 756 (2d Cir. 1965), *cert. denied*, 384 U. S. 947 (1966). See also *United States* v. *Bless*, 422 F.2d 210 (2d Cir. 1970) where the trial court's failure to give a charge (similar to that requested in the case at bar) with respect to events prior to one defendant's alleged entry into the conspiracy was held to be reversible error.

The issue of whether Bristol joined the alleged conspiracy at the December 14-15, 1955 meeting was a basic one. The government conceded, and indeed, asserted, that prior to this date "there is nothing about the activities of Bristol that we criticize or say are illegal" (4867a). Yet virtually all of the evidence relating to Bristol concerned its activities prior to this meeting.

Bristol made a timely request for instructions that evidence of events prior to December 14, 1955 could not be considered as proof of participation by it in any conspiracy prior to that date and that evidence that Bristol's business

practices were the same before as after December 14, 1955 could be considered as evidence that Bristol never joined any conspiracy (5586a-88a). Before counsel summed up to the jury, the trial court said that the charge would include the substance of this request (4658a-59a).* Thereafter, and contrary to this ruling the trial court failed to include the substance of Bristol's request in the charge.**

The trial court compounded this error by saying to the jury that "it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges" (4964a). The trial court conceded subsequently that this portion of the charge might have a "possibly misleading impact" and the "incidental result of misleading the jury" (5096a, 5097a-98a).

Although Bristol took specific exception to each of the foregoing errors (5007a-13a), the trial court overruled all exceptions. Yet, as the Court of Appeals said, these errors

* "A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence. . . ." *United States* v. *O'Connor*, 237 F.2d 466, 474, n. 8 (2d Cir. 1956).

** Bristol urged before the Court of Appeals, but that Court apparently did not reach, the contention that this failure was prejudicial error under Rule 30 of the Federal Rules of Criminal Procedure. Rule 30 requires the trial court to rule upon requests to charge in such a manner that trial counsel will know what the charge will contain and be able to present the case intelligently to the jury during summation. Failure to so rule is reversible error in and of itself. In *Wright* v. *United States*, 339 F.2d 578, 579-580 (9th Cir. 1964) the trial court indicated to defense counsel that it would "give the general instructions" requested; defense counsel's summation was based in part upon the theory reflected in the requests to charge; omission from the actual charge of the requested instructions, or others dealing with defense counsel's theory, was under these circumstances reversible error. Also in *Ross* v. *United States*, 180 F.2d 160, 165-166 (6th Cir. 1950), the trial court failed to rule, before counsel's summation, on each request to charge theretofore submitted and failed to include all correct instructions requested by defense counsel in substance or otherwise; this was one of several errors requiring reversal. *Cf. Downie* v. *Powers*, 193 F.2d 760, 766-67 (10th Cir. 1951).

"could well have caused the jury to believe that Bristol was involved in a conspiracy long before December 14-15, 1955" (426 F.2d at 47; 12610a). On this record, and in view of the settled principles previously established by the decisions of this Court, this "failure to differentiate between the legal and the illegal" was indeed "prejudicial error" (*Ibid*).

The Instructions Permitted the Jury to Convict Bristol for Acts Prior to the Date It Allegedly Entered the Conspiracy

The government contends that the ruling of the Court of Appeals "does not stand up in the context of the trial" (G.Br. 80). This contention is demonstrably false.

The government begins by ignoring the errors found by the Court of Appeals, dwelling instead upon instances in arguments of counsel and in the trial court's preliminary instructions to the jury before trial in which the jury was correctly advised (G.Br. 80-82). But the errors in the final instructions scarcely could have been mitigated by the previous arguments of counsel or by the preliminary instructions that the trial court had given months earlier. For at the very outset of the final instructions the trial court told the jury that the instructions to follow were controlling:

> "You have heard the arguments of very able counsel urging the different inferences and conclusions they wish you to draw from that evidence. It is my duty to now instruct you on the law. It is your duty to follow and apply these instructions. *Then, exclusively upon the evidence and under these instructions,* it is your critical and vital function to determine the facts and seek a verdict." (4941a)*

Furthermore, the trial court enjoys an exalted status in the eyes of the jury, the jury looks to him alone for guid-

* The trial court repeated this admonition a few pages later in the charge: "I have told you, and I say again, that the evidence and these instructions must be the *exclusive* materials for your judgment . . ." (4943a).

ance, and his influence upon the jury "is necessarily and properly of great weight." *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946). As in *Bollenbach*, the government's argument here amounts to an assertion "that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them." 326 U.S. at 613-14. Here, as in *Bollenbach*, "[t]o do so would transfer to the jury the judge's function in giving the law." *Ibid.*

The government next argues in effect that the errors found by the Court of Appeals really didn't exist because the trial judge's instructions "emphasized" that Bristol could not be convicted for conduct prior to December 1955 (G.Br. at 82-83). The difficulty with this argument is that the portions of the charge relied upon by the government simply did not say at all, let alone "emphasize", that Bristol could not be convicted for conduct prior to December 14-15, 1955. The portion of the charge set forth verbatim in the government's brief (G. Br. at 83) does no more than state in abstract terms the routine admonition that the jury was to pass upon only the charges made and defended in this case. This is not a statement that Bristol could not be convicted on the basis of its pre-December 1955 conduct, and it in no way "emphasizes" such a concept. Nor was any such concept stated or "emphasized" on any of the "four separate occasions during the instructions" when the trial court said that the government claimed Bristol joined the conspiracy in December 1955 (G.Br. 83). For on each such occasion the trial court simply said, without more, that the government claimed Bristol entered the alleged conspiracy at the December 14-15, 1955 meeting.*

* Significantly, it was immediately following the first of these four occasions (4963a) that the trial court erred and told the jury "it

The government's concluding argument is that an instruction that Bristol's pre-December 1955 conduct could not be considered as proof of Bristol's being in "any" conspiracy would have been a "clear departure from established principles" (G.Br. 83-87).* It says that because evidence of pre-conspiracy conduct is relevant to motive, intent and method of operation, and may also be a basis for showing illegal design, "both sides had the right to emphasize that conduct in presenting evidence and in argument" (G.Br. 83-84), citing *United States* v. *Houlihan*, 332 F.2d 8 (2d Cir. 1964), *cert. denied*, 379 U. S. 828 (1964).

Houlihan holds that there is no error in admitting evidence of pre-conspiracy conduct to show motive to form a conspiracy thereafter when the jury is "specifically instructed" that the evidence of pre-conspiracy conduct "was admitted only to prove motive." 332 F.2d at 14-15. We do not quarrel with the general correctness of this proposition. But it has no relevance here. The government did not request that the jury be "specifically instructed" that evidence of events occurring prior to December 14-15, 1955 "was admitted [against Bristol] *only* to prove motive", and the trial court gave no such instruction.** Even if such instructions had been given, they could not and would not

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is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges" (4964a).

* As we pointed out at pages 41-42 above, this argument is based on a misconception of the meaning, in context, of the statement of the Court of Appeals.

** When the trial court stated that it would grant the substance of Bristol's request that evidence of events prior to December 14, 1955 could not be considered as proof of its participation in any conspiracy prior to that date, the government requested that as a corollary the jury also be told that it could consider such evidence as "background", and the trial court agreed (4659a). Apparently as an incidental result of the failure to give the substance of Bristol's request, the trial court also failed to tell the jury that it could consider events prior to December 14-15 as "background"; nowhere in the charge was any such "background" instruction given.

have obviated the need for a comprehensive charge differentiating as to Bristol between the legal and the illegal. The government's "motive" argument thus is an irrelevance which in no way detracts from the prejudicial error resulting from the trial court's failure to give such comprehensive instructions.

Bristol's conduct before December 1955 concededly was innocent and remained unchanged thereafter. The trial court's instructions did not furnish adequate guidance to the jury as to the inferences it could properly draw from this evidence. For the trial court's failure to give the substance of the instruction requested by Bristol permitted the jury to avoid coming to grips with, or at least to leave unresolved, the very hard question of how Bristol's entry into a conspiracy can be rationally inferred from conduct and business policies subsequent to December 14-15, 1955 which differed not at all from concededly innocent, non-conspiratorial policies prior to that date.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 15, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-72

UNITED STATES OF AMERICA,

Petitioner,

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CHAS. PFIZER & CO., INC.

The government's brief adequately sets forth the opinions below, the basis of this Court's jurisdiction, the statute involved and the procedural background of this case. We submit, however, that it does not adequately state the question presented to this Court or the facts which gave rise to the case.

QUESTION PRESENTED

As will be shown below, the government's statement of questions presented reflects a serious misconception of the

nature and grounds of the decision below. A more appropriate statement of the issue before this Court is:

> Whether the Court of Appeals properly found that errors in the conduct of the trial, and particularly in the charge to the jury, deprived the defendants of a fair trial.

STATEMENT

Nature and Grounds of the Decision Below

The Court of Appeals concluded that errors in the conduct of the trial, and particularly in the charge to the jury, "were sufficient to deprive the defendants of a fair trial" (12618a, 437 F.2d at 958).

There is no basis for the suggestion that the decision was reached by considering particular language in isolation (G. Br. 2). It was expressly based upon a "review of the entire charge" (12598a, 426 F.2d at 41) and a "review of the entire record" (12611a, 426 F.2d at 48). While each error related to a separately identifiable subject and was serious standing alone, the ultimate decision was based upon an evaluation of the charge as a whole in the light of the record as a whole. The conclusion that the defendants had been denied a fair trial was expressly stated to result from the errors "when taken as a whole" (12618a, 437 F.2d at 958).

Because of the nature of the case, the charge to the jury was of unusual importance. All of the direct evidence was inconsistent with the allegation of conspiracy. The prosecution relied entirely upon circumstantial evidence which consisted mainly of marketing practices of the companies engaged in selling broad spectrum antibiotics, data as to the economics of producing and marketing such drugs, and technical evidence as to the fermentation and recovery of antibiotics and as to procedures in the United States Patent

Office. The complexity of the evidence presented a special need for clear and even-handed analysis for the benefit of the jury. And even more important was the fact that the evidence principally relied upon by the prosecution to support an inference of conspiracy lent itself very readily to a misconception on the part of the jury that this was really a prosecution for profiteering or for misleading the Patent Office.

The charge did not give the jury adequate guidance in its difficult task. Evidence of great importance to the defendants was down-graded and, to some extent, given misleading treatment. On the other hand, the treatment of matters principally relied upon by the government created a serious risk that the jury would be improperly influenced by the inflammatory assertions of profiteering or patent fraud. The Court of Appeals concluded: "The jury thus entered upon its deliberations with its attention diverted from the real issues to patent fraud and unreasonably high prices—both inflammatory issues" (12602a, 426 F.2d at 43).

The Court of Appeals was of the view that, on the facts, this was a "close" case (12618a, 437 F.2d at 959); and the dissenting judge characterized the government's evidence as "not overwhelming" (12611a, 426 F.2d at 48). This made the cumulative effect of the errors found all the more serious.

The Court of Appeals did not reach all of the errors asserted by the defendants in that court. Many of the asserted errors which remain unreviewed were substantial and our omission of reference to them in this brief is due only to the fact that they are not necessary for a review of the actual decision of the Court of Appeals. It should be noted, however, that the majority of the court below inclined to the view that in one respect, at least, the evidence of conspiracy was insufficient to go to the jury, which would in itself require a new trial (12619a, 437 F.2d at 959).

The Issue at Trial

The basic allegations in this case were that the defendants agreed to restrict entry into the broad spectrum antibiotics market and to maintain uniform and stable prices on their sales in that market. More specifically, it was alleged that Pfizer and Cyanamid entered into such a conspiracy at meetings between their chief executives in November 1953 and that Bristol, Squibb and Upjohn joined the conspiracy at meetings between the chief executives of Pfizer and Bristol in December 1955.

There was no direct evidence to support these allegations of conspiracy. There was an abundance of direct evidence refuting them. The principals who attended the challenged meetings told in detail what the meetings were about, what was said, and what understandings were reached. These understandings were embodied in written agreements which the government conceded were entirely lawful on their face (B.P. ¶ 7, 280a; 4865a, 4966a, 5568a). The testimony was flatly inconsistent with, and included specific, factual denials of, any understandings of any kind at the key meetings or at any other time on the matters alleged in the indictment.

The theory of the prosecution was that, despite all the direct evidence to the contrary, there must have been side agreements embodying the terms of the alleged conspiracy, and that the "must have been" was to be inferred from the way the parties subsequently acted (2378-79a, 2432-33a, 4853-54a, 4855-56a, 4865-66a, 4906a). The burden of the prosecution therefore was to establish beyond a reasonable doubt that the behavior of the parties was so inconsistent with what might have been expected of businessmen, acting independently in the interests of their respective companies, as to justify the conclusion that there was indeed agreement upon the terms of the alleged conspiracy.

The position of the defendants is that the conduct of the defendants was exactly what one would expect of companies acting independently in their separate interests. There was no evidence to indicate that the conduct of Pfizer, or any other alleged conspirator, was unusual in the pharmaceutical industry or was different from what an independent competitor would have done in the circumstances. Indeed, the conduct relied upon by the prosecution was in large measure simply a continuation of policies and practices which the respective defendants had followed long before any conspiracy was alleged to have existed and which were adopted for legitimate business reasons.

A basic defect running through the whole of the government's case is its failure to distinguish between acts logically evidencing unlawful agreements or understandings and acts based upon mere prediction as to what the competition will do. No inference of wrongdoing can logically arise from the fact that a company in a market with few sellers reasonably predicts that others will probably match a price cut or seek to obtain or enforce patent rights, and thereafter bases its own strategy on such predictions. Businessmen must make such predictions and rely upon them every day. Since a company's competitors are in the same business and since a company's prosperity and very survival may depend upon the making of perceptive predictions about its competitors, one would expect such predictions often to be accurate. The mere fact that such normal and reasonable predictions made by one company with respect to competitors turn out to have been accurate does not show that the competitors agreed or conspired, expressly or by implication, that they would be accurate. *See* Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962).

SUMMARY OF THE FACTS

A. The Alleged Conspiracy to Exclude Competition.

There is no dispute that during the period alleged in the indictment Pfizer, Cyanamid and Bristol were the only manufacturers of tetracycline, that the five alleged co-conspirators were the only sellers of tetracycline products, and that (with one exception) there were no bulk sales of tetracycline except those by Bristol to Squibb and Upjohn. However, these facts alone do not establish that the market situation was the result of conspiracy. The question for the jury was whether additional evidence justified an inference beyond a reasonable doubt that this market situation resulted from conspiracy.

1. Evidence Relating to the Settlement Between Pfizer and Cyanamid.

a. Pfizer's Entry into the Broad Spectrum Market.

Broad spectrum antibiotics were revolutionary discoveries of the late 1940's and early 1950's. These drugs—Aureomycin, Chloromycetin, Terramycin and tetracycline—

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* There were two principal phases of the government's allegations and of the evidence at trial. In connection with each of the three counts of the indictment, the government tried to prove that the defendants conspired to exclude others and that they also conspired to fix prices. Some of the evidence primarily related to the conspiracy-to-exclude charge and other evidence primarily related to the conspiracy-to-fix-prices charge. The case was tried on the theory (and the jury was instructed) that the jury could convict on each count if it found that *either* type of conspiracy was proven (4955a, 4964-65a, 4998a). The verdict was a general one, and it can never be known which conspiracy the jury found. In such a situation a new trial on all three counts is required if error was committed in the trial of either of these conspiracy charges. *Nash* v. *United States*, 229 U. S. 373, 379-80 (1913); *Patterson* v. *United States*, 222 F. 599, 650 (6th Cir.), *cert. denied*, 238 U. S. 635 (1915); *see also Haupt* v. *United States*, 330 U. S. 631, 641, n. 1 (1947).

were remarkably successful products from the moment of their introduction.

Aureomycin was first introduced by Cyanamid in 1948, and was followed in 1949 by Chloromycetin, produced by Parke, Davis. Both of these products were patented. Cyanamid, which held the Aureomycin patent, did not license others and was the sole seller of that product. Parke, Davis, which held the patent on Chloromycetin, followed a similar policy and was the sole seller of that product.

Pfizer introduced Terramycin in 1950, and in doing so entered the business of pharmaceutical marketing for the first time. Until 1950, Pfizer was not regarded as a pharmaceutical house at all; it offered nothing to wholesale or retail druggists, to hospitals or to the medical profession. It had begun the manufacture of finished medicinal products during World War II, but sold only to other manufacturers and the government until 1950. Its name was virtually unknown to the drug trade, hospitals or physicians, and it had none of the large-scale apparatus necessary for the marketing of prescription drugs (2354-56a, 2434-36a, 2541-45a).

The discovery of Terramycin in 1949 provided the opportunity for breaking into the field of pharmaceutical distribution. However, this opportunity carried with it a great risk because large expenditures would be needed to build and maintain an effective sales organization, and Pfizer would, in effect, be gambling on the success of its one product. Moreover, Pfizer would be entering into competition with old and well-established firms having established good will among physicians, broad product lines, extensive research programs spanning a variety of fields, superior distributional and sales facilities, and established managerial organizations. Pfizer had none of these advantages (2356-57a, 2545-49a).

Pfizer's management decided to take the risk and enter the pharmaceutical business. At the same time they made

two other decisions. First, they concluded that, since the company would be relying so heavily on Terramycin as its vehicle for market entry, this product should be maintained as a Pfizer specialty, with no licenses or bulk sales to other manufacturers (2357-58a, 2387a, 2435a, 2548-49a, 2659a). Second, they determined that other drug products would have to be found which could take their place with Terramycin as Pfizer specialties, thus broadening and strengthening the company's product line (2355-59a, 2549a).

b. Discovery of Tetracycline.

Pfizer scientists promptly began research for the discovery of new drugs. A result of this program was the discovery of tetracycline by Dr. Conover, a Pfizer scientist, in June 1952 (2359a, 2554a, 2562a). A patent application for both product and process claims was filed in October of that year (GX6, 7535-42a).

Pfizer was not then able to proceed with the commercial manufacture of tetracycline. The only process known to the company for making that drug was the deschlorination of Aureomycin, a chemical process by which the molecular structure of Aureomycin was changed and a new and different chemical compound was created. Since this process required the use of Aureomycin, on which Cyanamid held both product and process patents, Pfizer could not engage in the manufacture of tetracycline without either a patent license or a supply of bulk materials from Cyanamid. Pfizer tried to get around this obstacle by searching for a means of manufacturing tetracycline by direct fermentation, but this effort was unsuccessful (2359-64a, 2554-60a).

c. Pfizer Becomes Aware of Cyanamid's Patent Application.

In October 1952, an article was published by Pfizer scientists in the Journal of The American Chemical Society,

which showed the chemical formula of tetracycline and its relation to the chemical structures of both Aureomycin and Terramycin (2766a, 2769-70a). This article led Cyanamid scientists to begin work which resulted in their production of tetracycline by the deschlorination of Aureomycin. Cyanamid applied for a product and process patent in March 1953, five months after Pfizer's application (2560-61a, 2759-60a; GX5, 7455-83a).

In the summer of 1953, Pfizer became aware of Cyanamid's progress toward commercial production of tetracycline. By this time, Cyanamid had produced substantial quantities of that drug and was engaged in clinical testing in a number of hospitals throughout the country. Pfizer's first information of this activity came through its salesmen, who learned of it in their calls upon hospitals (2361a, 2448-49a, 2554-56a). Then in October 1953, at an antibiotics symposium sponsored by the Food and Drug Administration, Cyanamid scientists presented papers describing the successful results of clinical testing of tetracycline. These revelations made it apparent that tetracycline was soon to be placed upon the market by Cyanamid. They also showed that Cyanamid scientists regarded tetracycline as superior to Aureomycin, which had begun to show some serious defects (2361a, 2449a, 2557a, 2723-24a).

In late October 1953, Pfizer received from the Patent Office a Notice to Copy Claims, indicating the imminence of an interference proceeding with respect to Pfizer's application for a tetracycline patent (GX4, 7392a). Because of articles published by Cyanamid scientists and the known facts as to Cyanamid's progress towards commercial production of the drug, Pfizer had little doubt that the other party to the interference had to be Cyanamid (2361-64a, 2447-49a, 2557-59a).

Pfizer was in a difficult position, despite its firm belief that it held priority of invention (2448a, 2560-62a, 2723-24a).

If the threatened interference was litigated, issuance of a patent on tetracycline would be delayed indefinitely. Pfizer would thus have no legal basis to prevent Cyanamid's exploitation of Pfizer's discovery (2559-60a, 2724a). Moreover, Pfizer would be blocked from producing tetracycline itself, even if it ultimately obtained the tetracycline patent, unless it could make or buy the necessary quantities of Aureomycin. This it could not do without some contract with Cyanamid, the holder of the Aureomycin patent (2364a, 2554a, 2559-60a).

d. Settlement of the First Interference.

At this point, Pfizer's management decided to enter into negotiations with Cyanamid. This was a logical and rational decision because it was the only way of overcoming the patent block which Pfizer faced.

Settlement was equally logical from Cyanamid's point of view. Since Cyanamid had already asserted to the medical profession that tetracycline was superior to its own product, Aureomycin, the risk that Pfizer might establish priority was particularly serious for Cyanamid. This risk loomed large, since Cyanamid was aware that its work on tetracycline had been begun only after Pfizer's publication of scientific information about that drug, and had been prompted by that publication (2769-72a, 2805-07a).

Two meetings between the companies were held in November 1953. These were the meetings at which the government claimed that Pfizer and Cyanamid formed the alleged conspiracy to exclude competitors and fix prices (B. P. ¶¶ 2, 9, 27(a), (d)-(f), 278a, 281a, 298-300a, 1106-07a, 1130-31a, 1482a, 1484a, 1495-96a, 4520-21a, 4829-31a, 4853-54a, 4866-67a, 4872-73a, 4999-5000a).

On the first occasion, John E. McKeen, Pfizer's President, went to see Wilbur G. Malcolm, Cyanamid's President, at the latter's office (2284a, 2393a, 2449-51a, 2452-53a, 2767a).

This meeting was preliminary in nature. McKeen outlined the general basis of a settlement which Pfizer would be willing to accept to enable that company to begin the prompt production and marketing of tetracycline. Malcolm indicated that he was willing to consider a settlement. It was left that the parties would think about the matter and meet again in a week or two (2284-85a, 2393a, 2450-52a, 2564-66a, 2767-72a).

At the second meeting, McKeen was accompanied by John J. Powers, Jr., a Pfizer vice president, and Malcolm was accompanied by George E. Martin, a Cyanamid vice president. The terms of a settlement were discussed in detail and an agreement in principle was reached. The terms agreed upon included:

1. Settlement of the interference in the usual way. This would involve an exchange of proofs of priority and a concession of priority by the party shown to be later, or, failing such concession, an early submission of the proofs to the Patent Office for binding determination as to priority without appeal from the decision of the Board of Patent Interferences.

2. An undertaking that the winning party to the interference would grant to the losing party a non-exclusive license to make, use and sell tetracycline under any patent that would issue to the winning party on the pending applications.

3. A non-exclusive license from Cyanamid to Pfizer under the former's Aureomycin patents to make that product for use in the manufacture of tetracycline, and the know-how and culture necessary to make the license effective.

4. The sale by Cyanamid to Pfizer of enough bulk tetracycline to enable Pfizer to get into the marketing of tetracycline while it was setting up its own procedures for the manufacture of Aureomycin and its conversion into tetracycline (2302-03a, 2396-97a, 2454-58a, 2772-73a).

These terms were reasonably related to the business objectives of each party and to the relative negotiating strength of each. In retrospect, it is difficult to see how either party could have been expected to agree to a settlement significantly different from that actually made.

As had been foreseen, the Patent Office declared an interference between Pfizer and Cyanamid on December 28, 1953 (GX7, 7556a). On January 11, 1954 the oral agreements were reduced to writing (GX's 53-54, 8527-60a). The companies promptly exchanged proofs of priority, and it was concluded that Pfizer had priority of invention, a decision not disputed by the government. After a concession of priority was filed by Cyanamid, the first interference was dissolved in February 1954 (2310-12a; GX7, 7561-62a).

The government conceded before trial that the above agreements were completely lawful in and of themselves (B.P. ¶ 7, 280a). Its theory at trial was that something else was agreed to between the parties in addition to what is referred to above. It claims here that the settlement formed part of a pattern evidencing such an understanding (G. Br. 13). There is nothing in the facts concerning the settlement, however, which suggests that there was anything other than the normal working out of a patent conflict, with each company driving the best bargain it could.

The government asserts that, since tetracycline was going to have a great impact on the broad spectrum antibiotics market, this gave Pfizer and Cyanamid a motive to conspire to exclude others from tetracycline (G. Br. 8-9). However, this suggested motive is not borne out by the facts. The record shows that Pfizer was confident from the beginning that it would get the patent on tetracycline and use it to help build Pfizer's pharmaceutical business (2318-19a, 2554a, 2558-62a). From the Notice to Copy Claims, it understood that its tetracycline claims were allowable (2315a, 2558-59a). And it was confident of its priority

over its rival Cyanamid (2560-62a). As the government admits (G. Br. 13), Pfizer "justifiably believed" that it would receive a patent on tetracycline early in 1954. To suggest that Pfizer had a motive to conspire because it considered tetracycline a promising new product as to which it had a strong patent position is simply unjustified.

The government's contention that there was something unusual about the settlement appears to be based in large part on the agreement that Cyanamid would sell a substantial quantity of bulk tetracycline to Pfizer. In part, the government argues that, since this transaction enabled Pfizer to accelerate its entry into the tetracycline business, there was something suspicious about it. The uncontroverted fact, however, is that Malcolm was afraid, and McKeen believed, that Pfizer's position as to priority of invention was stronger than Cyanamid's (2448a, 2560-62a, 2723a, 2769-72a 2773a, 2805-06a). Moreover, as events later proved, Cyanamid could sell bulk to Pfizer and still gain the competitive advantage of being the first to market tetracycline (1785-86a, 2289-90a, 2825-27a; Ct.X 4, 6848-49a). In such a situation it would have been strange if McKeen had not insisted upon arrangements permitting Pfizer's prompt entry into the market, and it would have been foolhardy for Malcolm to have prevented a settlement by stubbornness on that point.

The government has also argued that there was something suspicious about the fact that these sales were not pursuant to a written agreement. Although the other provisions of the patent interference settlement were embodied in the agreements executed on January 11, 1954, the bulk sales transactions were covered by purchase orders and invoices (GX's 285-95, 644, 8785-95a, 8972a). This was the normal procedure for short-term sales of bulk materials (2383a), and it was especially appropriate here because Pfizer demanded that deliveries of bulk tetracycline begin at

once and not await the execution of formal agreements on other matters (2451a).

In addition to arguments made on the basis of the bulk sales, the government also argues that a public statement made by McKeen to the Security Analysts Society of New York on January 29, 1954, indicated that Pfizer and Cyanamid had reached an agreement to exclude competition (G. Br. 14). The statement alleged to support this inference was made during a question and answer period following prepared remarks delivered by Pfizer's officers and directors to the Security Analysts who had met at Pfizer's Brooklyn plant to analyze the company's prospects. McKeen was asked by one of the visitors whether Pfizer was planning to license Bristol if it received a patent on tetracycline. He replied that Pfizer did not then intend to grant any licenses beyond the one required by the interference settlement (2319-27a, 2484-85a). The policy stated made good business sense for Pfizer irrespective of what any other company might do. Therefore, neither the policy itself, nor McKeen's willingness to state it in response to a question from a security analyst, tends to prove anything about conspiracy.

2. Facts as to Proceedings in the Patent Office.

a. Bristol Causes a Second Interference.

In September 1953, after both Pfizer and Cyanamid had published scientific articles relating to tetracycline, Bristol reexamined the results of its previous research and found that one of the substances which had been produced, but which had not been identified or isolated, appeared to be tetracycline (2874-76a, 3094-95a). After Bristol had seen the Pfizer and Cyanamid publications, it put together an application for a tetracycline patent, filed on October 19, 1953 (3085a). Since this application was filed more

than one year after the October 1952 publication by Pfizer scientists, the claim to tetracycline was barred (2914a, 3085a; GX9, 7713-16a).

After the rejection of this application, Bristol filed a "continuation in part", abandoning claims to tetracycline as such, but claiming separate patentability for tetracycline hydrochloride (3011a; GX10, 7887-935a). This led to the declaration of another interference in March 1954, approximately one month after the termination of the first interference between Cyanamid and Pfizer (3011a). This second interference involved Bristol, Pfizer and Cyanamid and served to delay the issuance of any patent for a number of months.

b. Positions Taken by Pfizer and Cyanamid on the Separate Patentability of the Hydrochloride Form of Tetracycline.

The government has claimed that alleged collaboration during this interference was in some way contrary to the individual interests of each company, and that this indicated the existence of a conspiracy. This argument ignores the fact that the companies were pursuing different and often conflicting objectives during this period. The record of the interference shows that eleven contested motions were made and that Pfizer and Cyanamid took positions in direct opposition to each other on eight of them (GX12, 8281-99a).

The only substantive issue on which Pfizer and Cyanamid took similar positions related to Bristol's claim for the separate patentability of tetracycline hydrochloride. Both Pfizer and Cyanamid opposed Bristol and took the position that the hydrochloride form was not separately patentable. The independent interests of each company mandated the similar positions taken on this issue. Cyanamid clearly would have been placed in a disadvantageous position had

a patent upon tetracycline hydrochloride issued to Bristol, since Cyanamid had already begun to market tetracycline products, largely in the hydrochloride form, in reliance upon the license it was entitled to receive from Pfizer. The issuance of a separate patent on tetracycline hydrochloride to Bristol would have prevented Cyanamid's continued sales of its principal tetracycline products without a further license from Bristol. Thus, Cyanamid had a clear interest in seeking to prevent this occurrence entirely apart from any hypothesis of conspiracy. Pfizer also had a clear interest in protecting its right to make use of its own discovery in the hydrochloride, as well as in other, forms.

c. Bristol's Attempts to Delay the Proceedings.

In order to obtain its patent as soon as possible, Pfizer naturally opposed Bristol's attempt to delay the proceedings through repeated adjournments. Much has been made of the fact that Cyanamid also opposed Bristol's delaying tactics. Cyanamid would not have to pay royalties to Pfizer except on sales made after Pfizer received the patent. It is argued that for this reason it would have been better off if it had joined with Bristol in seeking delay and that its failure to take this course indicates that it must have been in a conspiracy with Pfizer. However, the fact is that Cyanamid had a very good reason to oppose delay. It was very much in its interest to have the notion that the hydrochloride form was separately patentable put to rest as soon as possible before it had committed itself any further on, or gotten the medical profession any more accustomed to using, this form of the product. Early issuance of a patent to Pfizer, resulting in the beginning of Cyanamid's royalty payments, would be an insignificant price to pay for a prompt decision making clear Cyanamid's right to continue marketing tetracycline hydrochloride and thereby removing a threat to its entire tetracycline market position.

Some of the language quoted most frequently by the government in this case is from a paper filed by Harvey W.

Edelblute, Cyanamid's patent lawyer, in opposition to a Bristol motion for a delay of the proceedings and in response to a Bristol suggestion that Cyanamid might benefit from any delay obtained by Bristol. Edelblute said that Cyanamid opposed delay and would rather pay royalties to a bona fide patentee than see the market ruined by irresponsible price cutting (GX 12, 8185-87a). The claim was made that this somehow proved conspiracy.

These remarks could not tend to prove conspiracy, because they do not tend to signify any understanding between Pfizer and Cyanamid as to what either company would do. All they show is that Edelblute made a prediction as to Pfizer's future conduct—he recognized the well-known fact that it is often advantageous to be a non-exclusive licensee of a valuable patent because in such cases patentees often choose not to issue many other licenses on patented specialties. Neither this nor any other evidence shows that Edelblute knew or even suspected the existence of any express or implied undertaking between Pfizer and Cyanamid on this subject. The government failed to show why, in a non-conspiratorial situation, any patent lawyer worth his salt would have made any other prediction.

d. The Conflicting Positions of Pfizer and Cyanamid on Most Points.

On the most important issues in the second interference Pfizer and Cyanamid took positions hostile to each other. Pfizer contended that Cyanamid had no standing at all in the interference proceeding because of an estoppel arising from the settlement of the first interference. This contention prevailed and Cyanamid was, in effect, thrown out of the proceeding on Pfizer's motion (GX12, 8298-99a).

In another motion, Cyanamid sought to have the subject matter of the second interference broadened to include claims to a fermentation process for making tetracycline. Over Pfizer's vigorous objection, Cyanamid sought to have Pfizer excluded from the proceeding relating to these claims

by having any exchange of information take place only between Cyanamid and Bristol (GX12, 8126-29a, 8194-95a). This was certainly not cooperative conduct; and it should be noted that the fermentation counts pressed by Cyanamid were in large part the source of the information upon which the examiner later speculated as to co-production of tetracycline in the production of Aureomycin (GX12, 8293-94a).

All of the evidence relating to the second interference shows that each company was striving to advance its own interests, without regard to the effect that its position might have on the other. Rather than supporting any inference of conspiracy, such unilateral and independent acts tend to negate any understanding between the companies on any terms of an alleged conspiracy.*

e. Evidence of Alleged Patent Fraud.

In October 1954, the patent examiner dissolved the second interference and, reversing his earlier position, ruled that tetracycline itself was not patentable because of his speculation as to co-production of tetracycline along with Aureomycin by the prior art processes of the Aureomycin patents issued to Cyanamid (GX12, 8293-94a, 8299a). Upon this ruling Pfizer's Conover application was returned to *ex parte* prosecution and neither Bristol nor Cyanamid had any further part in it. A large part of the government's evidence had to do with the proceedings during the *ex parte* prosecution and involved an attempt to prove that Pfizer was guilty of unilateral fraud which led to issuance of the Conover patent in January 1955.

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* In the Court of Appeals the government based a suggestion of illicit cooperation between Pfizer and Cyanamid on the fact that Pfizer's attorneys expedited the handling of a brief filed by Cyanamid within the Patent Office. However, what the evidence shows is that Pfizer was served with a Cyanamid brief which took a position on a motion similar to that taken in a brief previously filed by Pfizer and that, after seeing the Cyanamid brief, Pfizer saw to it that the examiner had a copy of it before he decided the motion (3671-77a).

Pfizer continues vigorously to deny that it committed any fraud or other misconduct in the Patent Office. However, for purposes of this case, it is not material whether the charges of fraud were supported. Pfizer's unilateral steps in prosecution of the patent application had no probative value on the issue as to whether Pfizer and Cyanamid had conspired to exclude competitors from the manufacture and sale of tetracycline. The fact that Pfizer wished to obtain a patent and was proceeding vigorously to that end is undisputed. The steps which Pfizer took in the Patent Office would have no evidentiary value unless these steps themselves were a matter of conspiracy, and the government has conceded that it has no evidence that Pfizer and Cyanamid conspired to commit a fraud on the Patent Office (4135a).

During the second interference Cyanamid made statements to the effect that no tetracycline had been produced in its prior art Aureomycin production. The government asserts that these statements were untrue and makes much of the fact that in the *ex parte* proceedings Pfizer referred the patent examiner to these Cyanamid statements (G. Br. 17). However, there is no evidence that Pfizer had anything to do with Cyanamid's making of them or that Cyanamid knew anything about Pfizer's use of them until after the patent issued to Pfizer and the record of Pfizer's *ex parte* proceedings became public. Under these circumstances Pfizer's use of these references proves no more than that Pfizer was doing all it could to marshal the authorities properly available to it which supported its position in the *ex parte* proceedings.

The fact that Pfizer worked hard to obtain a patent on tetracycline does not show that it was acting any differently from the way a non-conspirator would have been expected to act.

3. The Evidence as to the Settlement Between Pfizer and Bristol, Squibb and Upjohn.

Another set of circumstances from which the government contended that the jury might infer conspiracy to exclude involved the settlement of patent infringement actions brought by Pfizer against Bristol, Squibb and Upjohn. Although the government conceded the legality of the license agreements which terminated these litigations (B.P. ¶7, 280a), it contended that Bristol's entrance into a conspiracy with Pfizer to exclude competition was indicated by the events surrounding the settlements.

a. Patent Infringement Charges Against Bristol, Squibb and Upjohn.

Bristol first began to market tetracycline under its own label in May 1954. Before its entry into the market, Bristol had incurred heavy losses, and desperately needed a new product. Tetracycline appeared to provide this potential lifesaver (1834a, 2875a, 3010-12a). In the fall of 1953, Bristol publicized its interest in tetracycline and undertook a crash program to get into commercial production (3008a).

In February 1954, Frederic N. Schwartz, President of Bristol, placed a telephone call to McKeen of Pfizer, prompted by Pfizer's declarations to the Security Analysts Society that it would issue no tetracycline licenses if it received a patent (2485-87a, 2687a, 2878-80a). In that telephone conversation, Schwartz indicated Bristol's interest in tetracycline and asked whether Pfizer would grant a license to Bristol if Pfizer received a patent. McKeen replied negatively, and said that Pfizer intended to enforce any patent which it received against Bristol or any other infringer (2329-30a, 2485-87a, 2687a, 2878-84a).

Bristol nevertheless decided to manufacture tetracycline, and it sought bulk customers. The bulk customers chosen

were Squibb and Upjohn, and the first agreements with these companies were made in September and October 1954. Shortly thereafter Squibb and Upjohn began to market tetracycline products under their own labels.

On January 11, 1955, Pfizer was issued the patent on tetracycline and it promptly filed infringement actions against Bristol, Squibb and Upjohn. These actions were instituted in the Northern District of Georgia, a district in which calendars were relatively current, in an attempt to obtain a speedy disposition on the merits. However, after nine months of litigation, the infringers succeeded in having the cases transferred to the Southern District of New York where, it was believed, they could not be reached for trial for a long time (2521-22a, 2566a, 3021-22a). By December 1955, it appeared that pretrial proceedings would still delay for many months, perhaps more than a year, the day when the cases would even reach the trial calendar (2521-22a, 3021-22a).

b. Bristol Agreements with Squibb and Upjohn.

Despite the delays which they had succeeded in obtaining, Bristol, Squibb and Upjohn were increasingly uneasy about their chances of prevailing in the infringement litigation (3088-92a). Upjohn became so pessimistic that in October 1955 its chief executive officer, Donald S. Gilmore, went to see McKeen of Pfizer to seek a separate settlement (2566-67a, 2902-04a, 3023a). No agreement was reached, but when Bristol learned of Upjohn's separate overtures, it became fearful of the loss of a major bulk customer and promptly sought a new agreement with Squibb and Upjohn (3023-29a).

The result was that in November 1955, one month before Bristol, Squibb and Upjohn are alleged to have entered into the conspiracy charged, the previously existing bulk sales agreements between Bristol, Squibb and Upjohn were

revised. The earlier agreements had provided that Squibb and Upjohn would indemnify Bristol for any damages arising out of their bulk purchases from Bristol in the event of an adverse decision in the infringement suit. The November 1955 agreements reversed these indemnity provisions and provided that Bristol would pay any infringement damages (3229a, 3239-40a; GX's 83, 108, 8639-47a, 8698-705a). In exchange for this, Squibb and Upjohn agreed to turn over the defense of the patent infringement suit to Bristol and to purchase their tetracycline requirements from Bristol for a period of three years after the litigation ended. It was agreed that these purchases might be discontinued at any time upon the reinstitution of the previously existing indemnity provisions (2893a, 2920-23a, 2946a, 3038a, 3229-34a; GX's 83, 108, 8639-47a, 8698-705a).

Squibb and Upjohn additionally agreed, in large part because of Upjohn's anxiety for a settlement, to pay half the cost of settlement if Bristol succeeded in terminating the Pfizer litigation within six months, and if the settlement included a license giving to Squibb and Upjohn at least the right to purchase, use and sell tetracycline to the drug trade (2922a, 3027-28a, 3033-35a; GX's 83, 108, 8639-47a, 8698-705a). All this occurred at a time when there is no claim of any conspiracy between Pfizer and either Bristol, Squibb or Upjohn.

c. Settlement of the Infringement Litigations.

Final settlement of the infringement litigations was hastened by Bristol's threat to raise a defense of unclean hands based on the fact that a private detective hired by Pfizer had been convicted of wiretapping directed against Bristol and Squibb (2516-19a, 2633-35a, 2732-33a). Although in the wiretapping case there was no charge or evidence that Pfizer had authorized the wiretapping, Bristol's threat

raised the spectre of adverse publicity and additional delay in the litigation. Pfizer, already disenchanted by the delays which had occurred and the demands which the litigation placed on its employees, agreed to discuss settlement (2515-24a, 2634-35a, 2888-89a).

Discussions took place on December 14 and 15, 1955, with McKeen and his patent attorney representing Pfizer, and Schwartz and the patent attorney for Bristol, Squibb and Upjohn representing the infringers (2515-29a, 2571-72a, 2632-33a, 2888-90a, 2919-20a). These meetings resulted in a settlement.

Under the settlement Bristol received a non-exclusive license to make, use and sell tetracycline (GX50, 8480-500a). In accordance with the terms of Bristol's earlier agreement with Squibb and Upjohn, it obtained for them non-exclusive royalty-bearing licenses to purchase, use and sell tetracycline to the drug trade (GX's 51-52, 8501-62a). Before these licenses were signed, McKeen of Pfizer double-checked with officials of both Squibb and Upjohn to make sure that the terms were satisfactory to them, and was told that they were (2570-72a; PX607, 12529a).

The McKeen-Schwartz meetings are claimed to have been the occasion when Pfizer began to conspire with Bristol, Squibb and Upjohn. However, these settlements were no more than a normal and straightforward compromise of hotly contested litigation. By suing for infringement on the day the patent issued, Pfizer had shown that it had no hesitation in putting the validity of its patent to a court test. The infringers, after strenuous efforts to find a basis for a claim of invalidity, had become doubtful about their chances of success. The fact that parties so situated decided to settle their controversies provides no logical support for an inference that the settlement included any additional side deals such as the terms of the alleged conspiracy.

Although the government admits that the licenses to Squibb and Upjohn were in themselves completely lawful,

it contends that there is something suspicious about the fact that they granted Squibb and Upjohn only the right to purchase, use and sell to the drug trade. However, the undisputed facts show that no suspicion of conspiracy can arise from that fact. The agreements by which Bristol was granted the power to negotiate licenses on exactly those terms were executed in November 1955, more than a month before Bristol, Squibb or Upjohn were alleged to have entered into any conspiracy, and Pfizer had nothing to do with those agreements. All that was shown was that Pfizer acceded to the demands of the settlement representatives of Squibb and Upjohn and granted the licenses sought by the three infringers (2529a, 2919-20a, 2924-25a, 3042a). No restrictions were contained in these lawful licenses, and Pfizer remained free to issue similar or broader licenses to any other corporations, including Squibb and Upjohn. The government has never offered any reason why a non-conspirator in Pfizer's situation would be expected to grant licenses broader than those demanded by its adversaries as a price for settling.

4. Evidence as to Failure to Grant Licenses or to Sell in Bulk.

None of the companies issued any licenses or made any bulk sales apart from the licenses issued in the settlement of controversies and the bulk sales by Bristol to Squibb and Upjohn and by Cyanamid to Pfizer. The failure to do so was relied upon by the government as evidence justifying an inference of conspiracy not to do so.

However, no reason was ever brought forward indicating why any of the companies would have been expected to operate differently in the absence of a conspiracy. This is not a case where any company had previously followed a course of licensing or bulk sales and then departed from that policy. Nor is it a case where the independent self-

interest of any company would have been served by following any different course.

This is especially true in regard to Pfizer, which had made the policy decision not to sell in bulk or grant licenses when (long before any alleged conspiracy) it decided to enter the pharmaceutical business. The fact that Pfizer followed this independently chosen course, except where special circumstances required departure, does not prove in any way the existence of a conspiracy. There was no evidence that the policies or practices of any of the companies were unusual, either for them or for the pharmaceutical industry in general. Indeed, it was shown that Parke, Davis, the second largest manufacturer in the broad spectrum antibiotic field and a concededly innocent party, had followed exactly the same policies, issuing no licenses whatsoever and making no bulk sales (Ct. X4, 6691-97a).

After all the evidence on these subjects was in, the trial court brought up a new point, which had never been advanced by government counsel. It was suggested that an inference of conspiracy might be drawn from the fact that Pfizer did not try to sell bulk tetracycline to Squibb and Upjohn after the settlement whereas McKeen had been willing to discuss the sale of bulk to Upjohn as a means of settlement when the question of compromise was first raised by that company. The short answer is that the factual premise that Pfizer never tried to make such sales was never proved and that no attempt was made by the government to do so. Before an inference could be drawn from the fact of failure to offer bulk to these companies, the fact of such failure would have to be shown by evidence. Perhaps because this was not a part of the government's theory of the case, it produced no evidence on the point.

B. The Alleged Conspiracy to Fix Prices.

The second phase of the conspiracy charge was that the defendants conspired to fix prices. In substance the government's accusation was that defendants' prices on their broad spectrum antibiotic products were uniform as among the companies and stable throughout the indictment period up to August 1960 and that this uniformity and stability must have resulted from agreement. Once again the government's burden was to introduce evidence showing that the defendants' pricing decisions were different from what would normally be expected of a non-conspirator in similar circumstances. This it failed to do.

Moreover, here again the direct evidence was flatly inconsistent with conspiracy. The pricing officials of each defendant and of Upjohn and Parke, Davis gave complete, consistent and unimpeached testimony as to the independent bases for their pricing decisions.* On all the evidence it is more reasonable to conclude that each company was acting of its own volition than to conclude that there was a conspiracy.

The defendants' sales of broad spectrum antibiotics were made to two broad classes of customers:

> (a) retail pharmacists and wholesale druggists, making up the *prescription market;* and
>
> (b) private hospitals, city, county and state hospitals and federal governmental agencies, making up the *hospital market.*

The price uniformity and stability to which the government points occurred in the prescription market, but not in

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* 2469-70a 2472-74a, 2477-78a, 2492-97a, 2562-64a, 2566-69a, 2576-609a, 2653-57a, 2677-79a, 2709-10a, 2713-18a, 2730-31a, 2733-35a, 2738-59a 2774-75a, 2787-88a, 2799-802a, 2981-82a, 2987-88a, 3016-20a, 3064-74a, 3081-82a, 3093-94a, 3244a, 3306-07a, 3332-33a, 3355a, 3357-58a, 3371-72a, 3385-86a, 3418-19a, 3424-27a.

the hospital market. The record contains clear and unimpeached evidence as to the differing economic characteristics of the two markets which made price cutting unprofitable in the prescription market* but profitable in the hospital market.**

1. Characteristics of the Prescription Market.

Sales by retailers to individual customers could be made only upon a physician's prescription. The effective choice of the drug to be used was that of the doctor, not the purchaser. Ordinarily, prescriptions were written for a drug by its trade name; a doctor wishing to prescribe tetracycline would not prescribe it by a generic name but would prescribe the particular brand name under which a company sold that product. By law in most states, and by long-established practice everywhere, a pharmacist had to fill the prescription precisely as it was written and could not, without specific permission of the physician, substitute one brand of drug for another.

In this market, therefore, the retailer had virtually no control over which company's product would be used by the patient (1574-75a, 1831-32a, 2752-54a, 3067-68a). A retailer or wholesaler could gain no advantage by buying a lower priced brand unless the doctors were favoring it, and a manufacturer could gain no advantage from cutting its price to such a customer.

Another basic fact was that the overall usage of broad spectrum antibiotics was governed by the incidence and nature of disease, not by price. If a physician thought a patient needed a broad spectrum antibiotic, he would pre-

* 2437-41a, 2477-78a, 2549-54a, 2576-77a, 2733-35a, 2746-49a, 2751-52a, 2753-55a, 2757-58a, 3064-67a.

** 2586-93a, 2750-54a, 3065-69a, 3246-48a; Ct.X 9, 6920-36a; Ct.X 11, 6943-7329a; BX's 475-76, 493, 10469-70a, 10482-83a; PX's 257-58, 12508-09a; 1782a, 1821-23a, 1831-32a, 1836-37a, 1838-39a, 2586-87a, 2588-90a, 2595-609a, 2750-51a, 3066-67a, 3246-47a.

scribe it and, at least at the price levels actually prevailing during the indictment period, he would not be deterred from prescribing a necessary drug by the problem of cost.* In economic terms, the demand for broad spectrum antibiotics, as a group of interchangeable drugs, was highly inelastic with respect to price. No company or group of companies could have expected to increase overall usage of these drugs by reductions in price (1571-72a, 1831-32a, 2553-54a, 2567a, 2751-55a).

In one respect, however, the relative prices of particular broad spectrum antibiotics or particular brands of tetracycline had an effect. A doctor who wished to prescribe a broad spectrum antibiotic often would, in choosing among these interchangeable products, consider differences in the cost to his patient in making his choice. For this reason no producer of broad spectrum antibiotics would wish to be undersold by a competitor (2437-41a, 2551-53a, 2576-77a, 2746-49a, 2754-55a).

The nature of the prescription market made pricing decisions almost immediately available to competitors. Catalogues of all drug companies were distributed to every drugstore and all drug wholesalers. There were thus over 50,000 places in the United States where the seller of any prescription drug could ascertain the prices of his competitors. The record shows that salesmen who called on retailers and wholesalers (and also those who visited hospitals) sent a constant stream of reports to their headquarters regarding pricing activities. A price reduction to a retailer, therefore, could be met before the doctors even learned of it (2553a).

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* Since the prices most frequently shown in the evidence were those for a bottle of 100 capsules, it is worth noting that it would be most unusual for any patient to have bought in those quantities. The most common prescription was for 16 capsules, which was enough, for example, for a case of pneumonia (2596-97a). So a public hospital using Pfizer's Tetracyn (its brand of tetracycline) was in a position to treat a case of pneumonia by the use of drugs costing it from $2.60 to $4.08 (Ct.X 9, 6922a ff.). At the highest known drugstore price the cost to the patient would have been about $8.00 (Ct.X 4, 6720a ff.).

A final fact bearing on the pricing of broad spectrum antibiotics was that during the indictment period they were new and amazingly effective drugs which were soon regarded by the medical profession as wonder drugs. The overall demand for these products increased steadily from 1953 through 1959, with a particularly heavy upsurge of demand in the year 1957 because of a severe epidemic of Asian flu. The overall demand (in terms of dollar sales) began to decline somewhat in 1960 and 1961, which were years of especially significant price reductions (1776-78a; Ct.X 4, 6848-53a; GX877, 10246a).

This case thus relates to a market in which the products could generally be substituted for each other, overall demand was inelastic with respect to price, relative market position might be affected by relative price, there was a limited number of sellers, secret price cuts were hard to accomplish and there was strong market acceptance. These characteristics of the prescription market made it a market in which, without conspiracy, there would be a marked tendency towards uniformity and stability of price. To the effect that this is so as a matter of economic analysis, *see e.g.*, Turner, *A Reply to Professor Galbraith*, 19 W.R.L. Rev. 201 (1968); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 661-66, 672 (1962). *See also* Due and Clower, *Intermediate Economic Analysis*, 220-29 (5th ed. 1966), where it is stated that experimentation with price increases or declines in such a market could be extremely damaging to a company's sales and profits because of possible competitive reactions, and as a consequence:

> "Seldom will they [the sellers] deliberately experiment, but will make changes only when they are reasonably certain that the new prices will be more profitable than the old." (*Id.* at 227)

See also Independent Iron Works, Inc. v. *United States Steel Corp.*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U. S. 922 (1963).

2. Pricing History in the Prescription Market.

When Pfizer entered the pharmaceutical business in 1950, its first pricing decision had to do with Terramycin. At the time it was publicly known that Aureomycin and Chloromycetin were offered in the prescription market at identical prices. Each price reduction on one product had been promptly met by a price reduction on the other.

Because of the likelihood that a lower price would promptly be matched and the certainty that a general price reduction would not increase total sales, Pfizer had no incentive to offer Terramycin at a lower price. Instead, the company decided to experiment with a price higher than that of the competing products, hoping to maximize profitability and give Terramycin an aura of superiority (2550-52a). However, reports soon began to come in from the field that even this small differential was having an adverse effect on the promotion of Terramycin as against the earlier broad spectrum antibiotics (2552a).

In May 1950, Parke, Davis announced a reduction in the price of Chloromycetin that would have widened the differential between Chloromycetin and Terramycin. Pfizer decided to meet this price reduction. At about the same time, Cyanamid also reduced its Aureomycin prices to match the Parke, Davis reduction (2551-53a).

In September 1951 Pfizer experimented with a price reduction of 15%. This was met promptly by both Parke, Davis and Cyanamid. No competitive advantage accrued to Pfizer from its reduction, and all companies ended up selling the same overall volume of broad spectrum antibiotic products at lower prices (2437-40a, 2552-54a). From these events it was apparent that in this market price reductions were basically self-defeating. As a result, the prices of all broad spectrums leveled off at this point.

The next pricing event came more than two years later when, in November 1953, Cyanamid introduced tetracycline at the same price as that being charged for the other broad spectrum antibiotics (2748-50a). Shortly thereafter, Pfizer had to decide what prices to publish for its brand of tetracycline. The idea of going above the prevailing prices for broad spectrum antibiotics was quickly rejected; Pfizer had learned from its early Terramycin experience that this would place it at a competitive disadvantage. The idea of charging a lower price was also rejected because such a price would probably be met at once by competition and the result would simply be lower revenues. The most prudent alternative was adopted by the company; it introduced its brand of tetracycline at prevailing market levels in January 1954 (2469-70a, 2477-78a, 2576-77a).

The subsequent introductions of tetracycline by Bristol in May 1954 and by Squibb and Upjohn in the fall of 1954 were all at the prevailing prices for the broad spectrum antibiotics already on the market. These prices were not reduced until July 1960 (Ct.X 4, 6720-846a).

McKeen gave cogent reasons why Pfizer did not reduce its tetracycline prices during those years. Management believed, on the basis of the characteristics and history of this market, that a price reduction would most likely be met by competition at once, would not expand overall demand, and would therefore be self-defeating (2733-34a). Broad spectrum antibiotics were Pfizer's most important products—its biggest source of revenues and profits (PX's 637-40, 12571-81a). Accordingly, the decision by Pfizer executives not to reduce these prices was really a decision not to fly in the face of logic and reason.

General list price reductions were not only self-defeating but were costly as well because of the industry-wide practice of making shelf-stock adjustments to retailers in the event of such a reduction (2553a, 2627-28a, 3020a, 3066-67a). It was estimated that a price reduction of only 10% would

have cost Pfizer between $750,000 and $1,000,000 in such adjustments (2733-35a).

In July 1960 countervailing factors led Pfizer to make the first list price adjustment during the indictment period by reducing its prices to direct retail accounts by 15%, thereby narrowing the margin between its retailer and wholesaler prices from about 20% to 6%. A major purpose was to increase direct sales to retailers and to rely less on distribution by wholesalers (2709-15a, 3373-90a, 3418-21a), a purpose which experience had shown could not be accomplished without narrowing the spread between prices to wholesalers and retailers.

Pfizer's management did not expect to gain any competitive advantage as against other manufacturers of broad spectrum antibiotics by this price reduction because of the likelihood that the other companies would meet it at once (3389-90a, 3402-04a). In fact, the other four tetracycline companies did meet the new price within a short time. Two of them also reduced their wholesale prices by 15% (Ct. X 4, 6720-846a; 3403-05a). This had the effect of placing Pfizer at some disadvantage on sales to wholesalers, but the company could not meet this wholesale price without re-establishing the 20% margin between its retail and wholesale prices, which would have defeated the whole purpose of the reduction to retailers (3404-05a, 3426-27a).

This was the first time in the history of broad spectrum antibiotics that Parke, Davis did not meet a price reduction in the prescription market. The government has argued that this departure by Parke, Davis from its previous practice casts doubt on the evidence that a price reduction would be self-defeating because it would be promptly met. There is no merit to this contention. The history of this market indicated that it was most likely that every company would meet a price reduction because any company not doing so would be likely to suffer a loss in sales. In fact, Parke, Davis' market share declined about 25% in

the year following its failure to meet the 1960 price reductions. As to Pfizer, there is no evidence that it gained any benefit vis-a-vis the tetracycline companies by initiating this price reduction (GX 877, 10246a).

The fact of price stability in the market where no seller could have expected to gain a competitive advantage by lowering the price does not tend to show that any competitor acted "in apparent contradiction of its own self interest." See *Milgram* v. *Loew's, Inc.*, 192 F.2d 579, 583 (3d Cir. 1951), *cert. denied*, 343 U. S. 929 (1952).

3. Pricing History in the Hospital Markets.

A different pricing situation prevailed in the hospital markets. The pricing officials testified that certain characteristics of the hospital markets made it possible to gain a competitive advantage by spot price reductions and that they made reductions.

The *NPA hospitals* (private hospitals) usually did not purchase by competitive bidding. They bought from the catalogue of the seller and expected to pay the catalogue price, which throughout the pharmaceutical industry was the same as the price to retailers (2586a). In the case, however, of different brands of the same generic drug (*e.g.*, the different brands of tetracycline) a number of these hospitals operated on a formulary system under which one brand could be substituted for another (1831-33a, 3067-68a). This meant that in the case of an NPA hospital, unlike a retailer or wholesaler, a seller could gain some competitive advantage by a spot price reduction.

Such price reductions, commonly made by the use of free goods, were given in varying amounts by the different companies during the period involved (1782a, 1836-38a, 1850-51a, 2586-89a, 3065-67a, 3072-73a; PX's 257-58, 12508-09a; BX's 475-76, 493, 10469-70a, 10482-83a). This device resulted in prices to private hospitals as much as 50% below list.

The *CCS hospitals* (city, county or state institutions) usually purchased on sealed bids and in larger quantities than did NPA hospitals. On routine bids the tendency was to quote the basic price. Especially on larger bids, there were frequently lower prices, accomplished either by direct bids at less than the basic CCS price or by a special discount to a wholesaler or retailer enabling him to submit bids at less than the manufacturer's basic CCS price (2586-87a, 2588-91a). A stipulated tabulation of bids to a number of CCS buyers shows that Pfizer's first tetracycline price to CCS hospitals in April 1954 was $25.50 per bottle. By 1961 it was selling substantial quantities at prices as low as $16.25—a decline of about 36%. (Ct.X 11, 6943-7329a).

In view of the steady and substantial decline in average selling prices to CCS buyers, it is not surprising that, after all the evidence on this subject was in, government counsel made the following concession (to the court, but not to the jury):

> "[A]s far as CCS hospitals go and Federal hospitals go, we are not maintaining at this point that there was identity of prices. Obviously the evidence in the case is otherwise. Nor have we introduced any evidence indicating conspiracy in regard to the pricing level." (4533a)

This concession was not a chance remark but was a considered affirmation of the government's original plan as stated in its pre-trial brief. In that brief it was said: "The Government will not introduce any evidence to prove price-fixing as to these classes of customers [CCS and federal hospitals], nor will it contend that such existed" (1141-42a). After the defense had rested and defendants had requested that the court inform the jury about the government's position, the concession was withdrawn (5572a).

The *federal agencies* bought almost entirely on sealed bids. The principal buyer was the Military Medical Supply Agency which bought for the armed services. Other substantial purchasers were hospitals of the Veterans Administration (2593-94a). In this market it is equally clear that there were differences among the tetracycline sellers as to their marketing strategies and that average selling prices declined substantially over the indictment period (Ct.X 9, 6920-36a). The concession of government counsel, quoted above, related to federal buyers as well as CCS buyers.

One tactic used by government counsel during his summation (and also used at pp. 29-30 of the government's brief in this Court) is to point, as if it were pointing to evidence of conspiracy, to one large bid for tetracycline oral suspension to the Military Medical Supply Agency in which several of the companies quoted the same price—namely the current price being quoted by at least one of the companies to large CCS accounts (2606a). This argument is unfair and irrelevant because the separate decision of each company not to start a price war was but one incident in a long history of bids in the federal hospital market where the government admitted it had failed to prove price fixing (2606-07a).

The conduct of the defendants in the hospital markets has significance beyond the government's failure to prove price fixing in those markets. In the prescription market it was apparent to the defendants that price reductions would be self-defeating. On the other hand, in the hospital markets, where price-cutting tactics could secure large orders, such tactics were widely used and the use of such tactics varied greatly among the defendants. The pricing patterns in these markets are affirmative evidence that there was no conspiracy.

4. Evidence as to Bulk Sales by Cyanamid to Pfizer.

Another government argument related to circumstances surrounding the sale of bulk tetracycline by Cyanamid to Pfizer beginning in November 1953. In this Court the government implies that Pfizer and Cyanamid officials must have had resale prices in mind because the price Pfizer paid for the bulk was about one-third the resale value of the product and that

> "the price reflected the drug industry's rule of thumb that the gross return of a product should be three times its factory costs . . ." (G. Br. 13)

From this it was suggested that Pfizer would not have agreed to pay $3,875,000 for bulk tetracycline unless it had an understanding as to the prices each company would charge to the drug trade. This is no more than an unwarranted assertion that businessmen always agree on resale prices when making large bulk purchases from competitors. Moreover, this argument misconceives the significance of the bulk purchase to Pfizer. Pfizer had demanded the bulk purchase as a condition of its settlement with Cyanamid so that Pfizer could enter the market promptly and reduce Cyanamid's lead time. It looked upon this bulk material as very important to its ability to compete in the broad spectrum antibiotics business. The gross profit or loss made on this material was insignificant in comparison with the company's overall broad spectrum antibiotics business plans. Accordingly, this payment provides no basis for an inference that Pfizer had any side agreement with Cyanamid concerning resale prices.

5. Changes in Market Shares and Supply and Demand.

Both at trial and in this Court (G. Br. 25-26) the government argues that it is suspicious that prices did not change even though market shares and supply and demand conditions did change. However, the government has never offered any cogent reason why such factors, even if proved, would have influenced the defendants' pricing officials to reduce their list prices and ignore the history and characteristics of the market. For example, why would Pfizer try to increase or even merely protect its market share by reducing its prices in the prescription market when it was virtually certain that competitors would follow at once and the result would only be a reduction in its total dollar sales and in its profits? Why would Pfizer reduce prices even if overall demand slumped when it is a proven fact that during the indictment period demand was inelastic with respect to price? The government cannot give satisfactory answers to these questions. The fact that the government cannot show that in actual markets a non-conspirator would have had reason to change its prices makes its supply and demand and market share evidence of no probative value.

6. Evidence as to Costs and Profits.

In support of its contention that the defendants conspired to fix prices, the government relies heavily on arguments based on the costs and asserted profit margins of the defendants. This evidence is analyzed in Point III, *infra*. Here we simply state that the government has never offered any cogent reason why the profit and market share picture which they assert this evidence depicts, would have influenced the officials of the defendant companies to reduce list prices in the face of the history and characteristics of the market.

SUMMARY OF ARGUMENT

Errors found by the Court of Appeals went to the very heart of the case. Upon a review of the whole record the court concluded that the defendants had been deprived of a fair trial. The decision was based upon an evaluation of the entire charge to the jury in the light of the pattern of the trial. The court considered the overall impact of a number of errors when taken as a whole. These errors consisted principally of instructions which undermined evidence especially relied upon by the defense and may have diverted the jury's attention from the conspiracy issue to the emotional but essentially unprobative charges of profiteering and patent fraud. The effect of the errors was particularly significant because this was a close case on the facts.

I.

The government alleged, and attempted to show at trial, that Pfizer and Cyanamid entered into conspiracy at meetings between the companies' officials held in November 1953, and that Bristol joined the conspiracy at meetings between Pfizer and Bristol executives in December 1955. The men who attended these meetings were the same men who were responsible for the marketing and patent licensing policies in question in this case. Their testimony completely refuted the government's charges of conspiracy and explained the independent business bases for those marketing and patent licensing policies. However, the trial court totally undermined this specific, factual testimony (i) by describing it as denials of conspiracy "in broad terms" and as "assertions of innocence," (ii) by suggesting that the jury base their decision on the circumstantial evidence in the case rather than on the direct testimony, (iii)

by erroneously implying that the testimony was inconsistent with earlier statements by the witnesses and (iv) by telling the jury to disregard some indeterminate portion of the testimony as "legal as well as factual contentions". These instructions overlooked the true nature of this testimony and were devastating to some of the defendants' most important evidence.

II.

Parke, Davis was the second largest company in the broad spectrum antibiotics market, and it followed marketing and patent licensing practices similar to, but even more restrictive than, those of the defendants. Since the government affirmatively asserted that Parke, Davis "absolutely was not" a conspirator, the defendants were entitled to rely on the evidence as to Parke, Davis as showing how an admittedly non-conspiratorial company would act in this market. Although the trial court recognized the defense position on this subject, it refused to give defense requests to charge which would have informed the jury of the admitted non-conspiratorial status of Parke, Davis and would have stated to the jury the defense position concerning this evidence. Moreover, the trial court compounded the error by suggesting that Parke, Davis would have been indicted but was not for some unstated reason and by implying that the jury should ignore the evidence as to Parke, Davis. Moreover, the defendants were improperly restricted in their arguments to the jury on this subject.

III.

The government's charges that the defendants earned "unreasonably high profits" on their broad spectrum antibiotics and that Pfizer committed a fraud on the Patent Office had little, if any, probative value on any proper issue in the

case. But they were especially calculated to divert the jury from the true issues in the case. Despite their potentially prejudicial impact, these false issues were permitted to assume a featured position in the trial and in the court's instructions to the jury.

For almost ten years before trial, the public was bombarded with extensive publicity relating to the allegedly high prices and profits of drug manufacturers. Shortly before and during trial Congressional committees held extensive and far-ranging hearings on this subject, hearings which received widespread publicity adverse to the drug industry. During trial, the government constantly emphasized the issue of high prices and profits, utilizing unrealistic comparisons between bare manufacturing costs and consumer prices. Yet, this evidence was not probative of any issue properly in the case. The trial court's instructions had the effect of increasing the risk that the jury would be diverted from these issues to a finding of guilt based upon a conclusion that the defendants were profiteers.

The charge that Pfizer obtained its tetracycline patent through fraud on the Patent Office was also heavily stressed at trial. Yet, since the alleged fraud took place during *ex parte* proceedings when Pfizer was admittedly acting on its own and had a clear independent interest in securing a patent, it, too, was of no probative value on the proper issues in the case. Despite the lack of relevance of this evidence the trial court refused to strike it, government counsel emphasized it in summation because it "reflected on the people involved," and the court permitted the jury to base a finding of conspiracy on it.

IV.

Two errors related to instructions about the licenses given to Squibb and Upjohn and about the defendants' pre-conspiracy-period conduct. These errors are fully dealt

with in the brief submitted by Bristol, and we do not repeat that discussion here. We simply point out that these errors were prejudicial to Pfizer.

ARGUMENT

The government quotes (G. Br. 36) from the concurring opinion of Mr. Justice Frankfurter in *Johnson* v. *United States*, 318 U. S. 189, 202 (1943), wnere it was said that in reviewing criminal cases it is particularly important for appellate courts "to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure." In this case, the Court of Appeals faithfully complied with that standard.

Having immersed itself in the whole record of the trial, the court came to the judgment that basic rights of the defendants had been prejudiced to such an extent that they had been deprived of a fair trial.

Far from extracting from episodes in isolation abstract questions of evidence and procedure, the court considered the actual effect of the charge as a whole, in the light of the pattern of the entire trial, and explicitly based its decision upon the interrelationship of the various problems raised and the effect of various errors when taken as a whole.

Virtually on its own initiative, the trial court gave instructions to the jury which substantially undermined the portions of the evidence heavily relied upon by the defense. This was in sharp contrast to the extensive emphasis on the evidence principally relied on by the government, which was high in emotional appeal but low in probative value. In addition, the court gave an instruction which virtually directed the jury to find that Bristol joined Pfizer and Cyanamid in conspiracy.

The errors involved in this pervasive pattern are not something dredged up as afterthoughts in order to support an appeal. Defense counsel objected to all of them promptly

and vigorously, and earnestly endeavored to have the trial court correct them before the jury retired. The court, however, was unwilling to change one word of the lengthy charge.*

This pattern of error was the more serious because of the closeness of the factual issues. Whatever view one might take where the government's evidence is "strong" or "overwhelming" (see *Berger* v. *United States*, 295 U. S. 78, 88-89 (1935), this was a case which the majority of the Court of Appeals found to be close and in which the dissenting judge found the government's case "not overwhelming."

I

The Trial Court Erred in Its Instructions as to the Significance of the Testimony of Defendants' Officials.

The testimony of participants in the allegedly conspiratorial transactions formed a key element of the defense case. Each of these men, officials of the defendants and alleged co-conspirators, gave thorough and factual explanations of the independent motivation behind the pricing, marketing and patent licensing policies adopted by the companies in question. Against that background these men also testified in great factual detail about the meetings which the government asserted marked the inception of conspiracy.

The task of the triers of fact was, upon *all* the evidence, to consider whether the conduct of the parties was inconsistent with the testimony as to what was involved in their negotiations and understandings, and (if some degree of inconsistency was found) to weigh the circumstantial evi-

* Each juror had a transcript of the charge in the jury room throughout the deliberations, and they were so impressed by it that they asked permission to keep the copies that had been supplied to them (5051a, 5060a, 5077a).

dence against the direct and decide whether the former so outweighed the latter as to establish guilt beyond a reasonable doubt.

A fair trial required that such an analysis and weighing be done even-handedly and with a clear understanding of the significance and effect of the evidence being considered.

The charge to the jury, however, militated against such an even-handed and intelligent consideration of the evidence. It effectively prevented a proper weighing of the direct evidence by down-grading the testimony of the defendants' officials, by suggesting (without any evidentiary basis) an inconsistency between their testimony and earlier statements and actions, by indicating that the circumstantial evidence as to conduct was more significant than the direct evidence and was indeed decisive, and by permitting the jury to convict even if they believed that the testimony of the principals was true.

A. The Importance of the Officers' Testimony.

The government's case centered around two sets of meetings between principal officers of the defendants:

> (1) The meetings of November 1953 between officials of Pfizer and Cyanamid at which agreements resolving the patent block between the two companies and settling a potential patent interference between them were negotiated; and
>
> (2) The December 1955 meetings between officials of Pfizer and Bristol at which a settlement of the patent infringement suits which had been brought by Pfizer against Bristol, Squibb and Upjohn was reached.

The government built its case around those meetings. The Bill of Particulars alleged that Pfizer and Cyanamid conspired "beginning in about November 1953" and that the arrangements made between Pfizer and Cyanamid in

the meetings of November 1953 "initiated the conspiracy" (B.P. ¶¶ 2, 9, 27, 278a, 281a, 298-300a). The Bill also charged that Bristol joined the alleged conspiracy "beginning in or about December 1955", and referred to the "illegal arrangements" negotiated between McKeen of Pfizer and Schwartz of Bristol in December 1955 (B.P. ¶ 2, 6, 9, 27, 278a, 280-81a, 298-300a).

At trial, government counsel explained to the jury the charge as to Pfizer and Cyanamid in these words:

> "[A] meeting took place between Mr. McKeen of Pfizer and Mr. Malcolm of Cyanamid which the government contends resulted in an illegal agreement to violate the antitrust laws." (1484a)

And government counsel explained that as to Bristol's alleged entry into conspiracy:

> "[U]ntil the time they made that deal—Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal. . . ." (4867a)

Throughout the trial the government consistently emphasized the charge that these meetings were the occasions for the formation of the alleged conspiracy by those in attendance (1106-07a, 1130-31a, 1482a, 1484a, 1495-96a, 4520-21a, 4829-31a, 4853-54a, 4866-67a, 4872-73a, 4999-5000a). As the Court of Appeals noted, this made the testimony about the meetings "vital to any jury decision as to the existence of a conspiracy" (12598a, 426 F.2d at 40). The case was tried and argued to the jury as if what happened at these meetings was of crucial importance.

The government called as witnesses all the company officials who attended any of the meetings, namely, McKeen and Powers of Pfizer, Malcolm and Martin of Cyanamid and Schwartz of Bristol. Each of these men testified fully

and in detail about the meetings which he attended; their testimony on this subject appears on 242 pages of the record.* The questions put to them by both government and defense counsel explored in depth the business situations which gave rise to the meetings, the objectives of the respective parties, the matters discussed, the things said, the points agreed upon and the extent, if any, to which the terms of the alleged conspiracy were among the subjects discussed or agreed upon.

This testimony was flatly inconsistent with the notion that any express or implied conspiracy was formed or existed at these meetings.

Since the government argued at such great length that a conspiracy was formed at these meetings, much of the testimony elicited from defendants' officers by both sides bore on what was or was not agreed on or understood at the meetings. But the testimony was not limited to the meetings. The officers also explained the economic bases of their respective marketing strategies during the indictment period, and negated any understandings, tacit or otherwise, on these subjects at any time. The testimony was thus flatly inconsistent with the theory, first suggested by the government after trial, that perhaps the conspiracy was formed at some time after the meetings.

As the government frankly admitted to the Court of Appeals:

> "The impeachment of the testimony of [defendants'] principal officials was important to the government in this case, since the government had no direct evidence of conspiracy. . . ." (Government Brief in Court of Appeals, 110-111)

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* 2283-304a, 2308-10a, 2328-29a, 2364-66a, 2374-75a, 2378-80a, 2392-97a, 2428-29a, 2431-33a, 2449-61a, 2469-70a, 2472-78a, 2513-33a, 2562-64a, 2567-72a, 2633a, 2674-75a, 2677-78a, 2679-83a, 2703-06a, 2723-25a, 273031a, 2734-35a, 2758-59a, 2766-75a, 2779-80a, 2802-04a, 2806-07a, 2820-21a, 2888-90a, 2917-21a, 2924-25a, 2993-95a, 3038-40a, 3041-42a, 3081-82a, 3092-94a, 3134-50a.

Yet this testimony continued to stand in basic contradiction to the government's case—at least until the trial court instructed the jury.

B. The instructions to the jury undermined the defendants' reliance on this testimony.

The officers' testimony showed that they had met with the legitimate objective of settling certain patent conflicts and controversies, that the agreements they reached were embodied in written contracts concededly lawful in themselves, and that neither the alleged terms nor the subject matter of conspiracy were discussed or agreed upon tacitly or expressly. Because of the strength and coherence of this testimony, defense counsel could and did rest without putting in a case and relied heavily on it in their summations. The court's charge, however, downgraded this evidence and focused the jury's attention instead on the circumstantial evidence as the proper basis for their decision. As the Court of Appeals found, the charge of the trial court "slighted and rather deprecated the testimony about the meetings" (12598a, 426 F.2d at 40).

After charging the jury that conspiracy allegedly began at these meetings, and that the meetings could have provided the opportunity for conspiracy, the court instructed the jury as to the testimony of the officials as follows (5000-01a):

> "Along with all the other evidence in the case, you have heard the sworn testimony of the principal officers of the three defendant companies, and you have heard each of them deny in broad terms that there was any understanding or agreement among them, either express or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. You must, obviously, give due and deliberate thought to this testimony, and ultimately attribute to it such

> weight as it merits in your impartial judgment. In performing this task, you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter. You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the conspirators did not believe they were violating the law or intend to commit such a violation.
>
> "This is by no means to suggest to you that you overlook or reject the sworn testimony of defendants' officers. That's for your judgment, not mine. The point being made here, as you understand, is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you."

In at least four specific respects this portion of the charge was confusing and erroneous, and its overall effect was to forestall a proper weighing of all the evidence.*

1. The charge began with a serious misdescription of the nature and significance of the testimony. It was described merely as denials of understanding or agreement "in broad terms." Further along, it was characterized as "assertions of innocence." Nowhere was there any recognition of the fact that the testimony consisted largely of affirmative and detailed accounts of what the meetings were about, what was discussed and what was agreed upon. The most effective justification of the allegedly conspiratorial meetings

* When the charge was given the defendants made prompt objection to it, but the court decided to leave it as it was (5041-42a).

was this complete and affirmative account of what was actually involved. This major aspect of the case was passed over when the testimony was described as denials "in broad terms" or "assertions of innocence."

When this scant and inaccurate treatment of a major part of the defense case is compared with the painstaking detail in which the court had previously gone into the various "means and methods" relied upon by the government, the likelihood of an adverse impression upon the minds of the jurors is apparent.

Moreover, even to the extent that the testimony included denials, it could not properly be characterized as being "in broad terms" and as "assertions of innocence." Rather there were direct, factual responses to detailed questions. The testimony was clear that when the witnesses said there was no agreement they meant there was no understanding of any kind, tacit or express (*See, e.g.*, 2364-66a, 2562-66a, 2730-31a, 3042a).

If it is suggested that the jury could be counted on to remember that this testimony was more substantial and affirmative than the trial court indicated, it should be noted that the last testimony about the meetings was completed 37 days before the charge was given to the jury. Although the trial court took great pains to discuss the content and significance of the evidence on Patent Office matters and costs and profits (the subject of evidence and discussion during much of the intervening 36 days), the court gave the jury no help in reconstructing the scope and content of the officers' testimony. Instead, the jury was given a serious understatement of its nature and effect.

2. Having thus given the jury an inaccurate statement of the nature and scope of the testimony in question, the court then proceeded to tell the jury, in so many words, that the circumstantial evidence as to conduct was to be given

greater weight than the direct evidence, and indeed decisive weight. The language of the charge in this respect was (5000a):

> "In performing this task [of giving due and deliberate thought to the testimony], you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, that *the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment* . . ." (emphasis supplied)

The function of the jury should have been to consider the testimony, to consider the circumstantial evidence and (if any inconsistencey was found) to decide which was the more persuasive, having in mind the requirement of proof beyond a reasonable doubt. Yet, the court effectively precluded such an analysis by telling the jury that "the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment." This was a clear invasion of the province of the jury.

It may be that, as the government suggests (G. Br. 52, n. 26), the court was paraphrasing language from *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960), where it was said that the existence of combination or conspiracy in that case was "to be judged by what the parties actually did rather than by the words they used." A transfer of that language to the instructions in the present case, however, would be quite inappropriate.

In *Parke, Davis* the question was whether the defendant's attempts to accomplish resale price maintenance had exceeded the permissible limits of the *Colgate* case.* The defendant had announced its intention to refrain from selling to price cutters. This alone the Court said would not

* *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

have violated the Sherman Act (362 U. S. at 45-46). But the company went further and took active steps which gained the participation of both wholesalers and retailers in the program of price maintenance (362 U.S. at 46). In this context the Court said:

> "So long as *Colgate* is not overruled, this result [actual resale price maintenance] is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right 'freely to exercise his own independent discretion as to parties with whom he will deal.' When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." (362 U.S. at 44)

The Court was not dealing with any issue as to what Parke, Davis had said or intended in its announcement of policy. It was rather dealing with the effect of the further acts undertaken by the Company in implementing its policy. The gist of the decision was that the further acts took the company outside the "limited dispensation" of *Colgate*. In this context the governing facts were not what Parke, Davis had said but rather what acts it had performed over and above its announcement of policy. The Court was clearly not declaring that a question as to what understandings were reached between certain parties had to be decided

solely on the basis of their subsequent behavior without regard to the direct evidence of what actually transpired between them.*

In the present case the defendants were entitled to have the jurors pay attention to *all* the evidence, both direct and circumstantial, as to whether the defendants had or had not arrived at an understanding, tacit or express, on the matters alleged in the indictment. The court's charge permitted and, indeed, directed the jury to focus their attention on only a part of the evidence. No juror giving due heed to this part of the charge could have been in any doubt that his "final answer . . . *must* be based upon the actual conduct of the defendants"—irrespective of his evaluation of the direct evidence. This constituted prejudicial error. *See United States* v. *Bloom*, 237 F.2d 158 (2d Cir. 1956).

3. The court next suggested to the jury, without any support in the record, that the testimony given by the officials was inconsistent with earlier statements made by them. This suggestion occurred in these words (5000-01a):

> "In performing this task [of giving due and deliberate thought to the testimony], you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, . . . that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter."

* The quotation from *Parke, Davis* in *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 195 (1963) is consistent with what has been said in the text. In *Singer* the Court concluded that the evidence showed a conspiracy among Singer and two foreign competitors to restrain and exclude the competition of Japanese manufacturers of sewing machines. In arriving at this conclusion the Court gave meticulous and extended consideration to the evidence as to the negotiations and communications among the alleged conspirators and also to the things they did. Its conclusion was based upon *all* the evidence.

The testimony of the defendants' officials dealt in great detail with "the things the defendants did and said at the time." There was not a scrap of evidence, written or oral, to suggest that anybody representing any defendant had made any statements inconsistent with what was asserted to have been said and done at the meetings. The inconsistency suggested by the charge simply did not exist.

If the court was merely saying that actions speak louder than words, this was an invasion of the jury's function. The old adage is not a rule of law. As Judge Wyzanski instructed the jury in *United States* v. *Interstate Eng'r Corp.*, 288 F. Supp. 402, 415 (D.N.H. 1967):

> "There is no rule of law that you must prefer direct evidence to circumstantial evidence, or circumstantial evidence to direct evidence. A jury can choose. Some jurors may believe that the direct testimony is better than the circumstantial. Some may think that the circumstantial evidence is better. Some may form their opinion by a combination. It is entirely a jury question."

If the jury thought that the conduct was to a greater or lesser extent inconsistent with the testimony, it was for them to decide whether, in this case, the actions spoke louder than the words. The court's suggestion, which was expressly stated as flowing from its authoritative definition of conspiracy, effectively precluded the jury from making its own evaluation of both the direct and the circumstantial evidence.

4. A further serious error in this part of the charge was that it permitted, and indeed invited, the jury to put the testimony to one side as reflecting partly legal contentions. It had been made abundantly clear to the jury that they were to take the law only from the court (4941a). It would follow that any legal contentions asserted by the witnesses were required to be overlooked or rejected.

The language of this part of the charge was (5001a):

> "You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the conspirators did not believe they were violating the law or intend to commit such a violation.
>
> "This is by no means to suggest to you that you overlook or reject the sworn testimony of defendants' officers. That's for your judgment, not mine. The point being made here, as you understand, is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you."

The first paragraph of this portion of the charge suggested that the officers' testimony had been basically to the effect that they had not believed that they were violating the law. However, no witness had testified that he did not "believe" he was violating the law, or had made any protestation that he had not intended to do so. The testimony had to do solely with matters of fact as to what was discussed, or not discussed, and what was agreed upon, or not agreed upon. The first paragraph quoted above was therefore irrelevant and misleading.

The second paragraph was also misleading because it suggested, inaccurately, that the officers' testimony consisted of "legal contentions". The testimony was factual about what was or was not said or agreed upon, expressly or by implication.

The factual nature of testimony as to whether there was an agreement was established by this Court in *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 225 (1939). In that case, arising under Section 1 of the Sherman Act, it was held that an inference unfavorable to defendant corporations might be drawn because they

> "failed to tender the testimony, at their command, of any officer or agent of a distributor [defendant] who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action."*

This part of the Court's decision rested upon the necessary and explicit premise that the question of agreement or no agreement was one of fact, on which significant testimony could be given. It would be a gross injustice to hold that when corporate officials do appear and do testify "whether in fact an agreement had been reached among them for concerted action" their testimony may be brushed aside on the ground that it involves legal assertions.

Consistently with this Court's reasoning in *Interstate Circuit*, the courts generally in antitrust cases have treated testimony as to whether or not agreement or understanding has been reached as factual testimony. *See, e.g., United States* v. *Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963); *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F.2d 199, 203, 206 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962); *Continental Baking Co.* v. *United States*, 281 F.2d 137, 143 (6th Cir. 1960); *Cole* v. *Hughes Tool Co.*, 215 F.2d 924, 940 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955); *Milgram* v. *Loew's Inc.*, 192 F.2d 579, 582 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); *United States* v. *Johns-Manville Corp.*, 245 F. Supp. 74, 79 (E.D. Pa. 1965); *United States* v. *Ward Baking Co.*, 243 F. Supp. 713, 717 (E.D. Pa. 1965); *Dyson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 86 F. Supp. 716, 727 (W.D.N.Y. 1949), *aff'd mem.*, 190 F.2d 951 (2d Cir. 1951)

Testimony very similar to that involved in the present case was treated as both factual and weighty in *United States* v. *Eli Lilly & Co.*, 1959 Trade Cas. ¶ 69,536 (D.N.J.

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* *See* to the same effect *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F.2d 738, 743 (3d Cir. 1945), *cert. denied*, 334 U.S. 811 (1948).

1959). In the face of extensive circumstantial evidence relied upon by the government to show an antitrust conspiracy, the court entered judgment of acquittal at the close of the government's case saying (at 76,150):

> "Thus the Government's case has consisted in large measure of the testimony of high-ranking corporate officers and employees of the defendants. . . .
>
> "This approach, an endeavor to prove the guilt of the defendants out of the mouths of their own officers and employees, resulted in testimony tending to establish the innocence of the defendants, if believed, because each of the foregoing witnesses either testified that his determinations, practices and policies as to polio vaccine were based upon independent business considerations only, and were in no wise the result of an understanding or agreement, tacit or otherwise, with any other defendant, or at least gave no testimony tending to establish the contrary."

The four decisions of this Court cited by the government to support the claim that whether an "agreement illegal under the Sherman Act has been made is a mixed question of fact and law" (G. Br. 51) have no bearing here. In *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396 (1948) the Court's reference to "mixed questions of law and fact" was merely part of a statement that the lower court had been wrong both on the law—as to whether certain things may be lawfully agreed to—and on the facts —as to whether there had been an agreement. This is a far cry from stating a rule for criminal conspiracy cases that the question whether defendants formed an agreement (which would admittedly be illegal if formed) is anything other than a pure question of fact. *United States* v. *General Motors*, 384 U.S. 127, 141, n. 16 (1966), involved only a question whether the evidence was so overwhelming as to compel a finding of conspiracy as a matter of law. In this sense it was like any factual question in that the

evidence may establish it as a matter of law. In *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44-45 (1960), a finding of fact that there was no conspiracy was set aside because the wrong standard of what was lawful conduct was applied. The same is true of *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194, n. 9 (1963). All of these cases dealt only with questions of this Court's power to reverse erroneous findings of fact by lower courts. They give no support to the proposition that the question whether an officer agreed to something is any more a mixed question of fact and law than any other kind of fact about which testimony is commonly given in criminal conspiracy cases.

But even if it were to be assumed that the testimony had some "legal" content, that would not substantially obviate the error here, since the charge gave the jury no guidance as to what portions of the testimony were to be regarded as subject to the "legal contention" infirmity.

The language of the court was that the legal contentions might be found in "assertions of innocence by such officers". There were no assertions of innocence as such. While all of the testimony was inconsistent with the allegation of understanding, tacit or express, and it all pointed in the direction of innocence, in no sense could any part of it properly be characterized as assertions of innocence. When witnesses testified in detail about what happened and did not happen at the meetings, they were showing their innocence. When they testified as to the business reasons which led them to follow the courses of conduct relied upon by the government, they were demonstrating innocence by showing independent reasons for their behavior. But this evidence of straight-forward business conduct was not mere "assertions of innocence."

What part of all of this was regarded by the trial court as reflecting legal contentions? There is nothing in the charge to answer this question. The jurors were left hopelessly at sea in trying to decide what part the court referred

to as areas of law which were its exclusive province and what part was supposed to be factual. A charge delegating to the jury the task of making such judgments, without any clear guidelines, is erroneous. See *Bollenbach* v. *United States*, 326 U.S. 607, 613-14 (1946); *United States* v. *Christmann*, 298 F.2d 651, 654 (2d Cir. 1962); *Chargois* v. *United States*, 267 F.2d 410 (9th Cir. 1959); *cf. United States* v. *Persico*, 349 F.2d 6 (2d Cir. 1965).

The overall effect of the instructions on the testimony of the officials was to prevent adequate and proper consideration of an important part of the evidence going directly to the basic issues in the case. It is still the law that a Sherman Act conspiracy arises only when there is an agreement, tacit or express, among the alleged conspirators. Such agreement may be found from the communications among the conspirators or from the behavior of the parties. But such behavior is simply one type of evidence from which the forbidden agreement may be inferred. As this Court put it in *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954):

> "The crucial question is whether respondents' conduct . . . stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement."

These errors were not cured by the other instructions referred to by the government (G. Br. 51). The instruction on credibility said nothing to help the jury distinguish "legal contentions" from "factual contentions". The other instructions merely defined some of the issues in the case and said nothing whatever about the significance of the officers' testimony. There is nothing anywhere in the entire charge which could undo the harm created by the instructions concerning this testimony.

The government attempts to brush off the criticisms of the instructions as to the officers' testimony on the ground that they "were based on the erroneous view that the government was required to show a specific express agreement" (G. Br. 52). The fact that on rehearing the Court of Appeals recognized that the conspiracy was alleged to have been implied rather than express did not by any means invalidate that court's criticisms of the instructions. Certainly the Court of Appeals did not intend to withdraw those criticisms, as is shown by the fact that in the majority opinion upon rehearing the instructions as to the officers' testimony were listed among the items as to which the court said,

> "[I]t would indeed be difficult for an appellate court to say that these items may not have affected the jurors' votes in a criminal case so close as this." (12618a, 437 F.2d at 959)

Apart from questions of what theories the Bill of Particulars permitted the government to assert as to when and how the conspiracy was formed, the case was certainly tried in such a way as to make the meetings and what happened at them a central issue in the case. Whatever conspiracy was alleged, it was consistently claimed to have originated as between Pfizer and Cyanamid at the meetings in November 1953 and to have been adhered to by Bristol, Squibb and Upjohn at the meetings in December 1955 when, as government counsel claimed, "Schwartz made that deal with McKeen" (4867a). Defendants were entitled to have their officers' testimony about these meetings given the full consideration by the jury which the actual charge prevented.

The case was tried, and was argued to the jury, on the theory that this testimony was an important part of the evidence which would have to be weighed along with the circumstantial evidence. The court's charge changed all that in a few paragraphs. The testimony was given much less significance than had been attributed to it by both the

prosecution and the defense. A question of credibility was raised by reference to non-existent inconsistencies. The jury was told that in the end they *must* base their decision upon the conduct of the parties. And some undefined part of the testimony was completely neutralized by branding it as argument on points of law which were the sole province of the court. The cumulative effect of the court's treatment of this testimony was devastating to the defense.

II

The Trial Court Erred in Its Treatment of the Evidence Relating to Parke, Davis.

Parke, Davis was the second largest manufacturer of broad spectrum antibiotics and made almost one-quarter of total broad spectrum sales during the indictment period (GX 877, 10246a). Its practices in regard to price levels, price changes, dosage forms, and marketing techniques were virtually identical to those of the defendants. Its practices in regard to sales in bulk and licensing under its patents were more restrictive than those of the defendants, since Parke, Davis issued no licenses and made no bulk sales (3332-33a, 3355-58a; Ct. X 4, 6692-96a, 6720-52a, 6836-46a).

Despite these basic similarities between the conduct of Parke, Davis and that of the defendants, the government asserted "on the record" that Parke, Davis "absolutely was not" a conspirator (4527a). This was more than a concession that no charge had been made against Parke, Davis; it was an affirmative assertion that that company was not a conspirator. This assertion made the evidence as to Parke, Davis very important to the defense because it showed that a company acting independently adopted the very practices which the government claimed would not have been adopted by the defendants in the absence of conspiracy.

The trial court, without any request from the government, raised questions as to whether the defendants could fully rely on this evidence, practically removed it from the jury's consideration and severely restricted arguments that defense counsel could make concerning it. Both before and after the charge to the jury defense counsel made consistent but unavailing objection to the trial court's treatment of this evidence (4646-47a, 5028a).

Although some of the instruction relating to Parke, Davis is reproduced in the government's brief (67-69), it is to the final paragraph, only partially reproduced in that brief, that the opinion of the Court of Appeals referred. We quote the paragraph in full, italicizing the words omitted in the government's brief:

> "Now, insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts about that subject have been placed before you and are part of the total evidence you may consider in reaching your judgment. However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis *was not indicted. Parke, Davis* is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom." (5001-02a)

This instruction was prejudicial because it failed to submit a vital element of the defense case to the jury and because it may well have caused the jury to disregard the defendants' arguments based on this evidence.

A. The Charge Obscured the Significance of the Evidence and May Well Have Prevented the Jury from Giving Proper Consideration to It.

The key to the significance of the Parke, Davis evidence was the given fact that Parke, Davis was not a conspirator. That fact imposed upon the government the formidable task of explaining how it was that the defendants' acts proved conspiracy when essentially the same acts of a non-conspirator did not. But the court never allowed the jury to know of this key to the significance of the evidence.

The significance of the evidence was made known to the court before the instructions were given to the jury. The subject was discussed during a conference of counsel with the court (not in the presence of the jury) in which the following colloquy occurred:

> "The Court [addressing government counsel]: . . . Let me ask you: What do you think about the situation of Parke, Davis in this case? There has been a memorandum that you haven't responded to about the significance of Parke, Davis' conduct, same prices, same general business behavior, there is no charge that it is a conspirator and I think I can fairly read the statement of the Government, as being a concession that Parke, Davis was not a conspirator.
>
> "Mr. Sklarsky: It absolutely was not, your Honor. We state that on the record.
>
> "The Court: You not only concede that, you assert it?
>
> Mr. Sklarsky: Yes, your Honor." (4526-27a)

In the same conference the trial court stressed the difference between such an affirmative assertion of innocence and a mere failure to indict. When government counsel suggested that the jury simply be told that the fact that Parke, Davis was not indicted or named as a co-conspirator was of no consequence (4527a), the court responded:

"The Court: No, but I can't let it go at that, when you have announced on the record that Parke, Davis was not a conspirator.

"Mr. Sklarsky: Of course, your Honor.

"The Court: You haven't just said, 'We didn't indict Parke, Davis,' That might be different. But you have stated that Parke, Davis was not a member of this conspiracy.

"Mr. Sklarsky: That is right.

"The Court: And then the evidence shows that it does many things similar to those proved against these defendants." (4528a)

There was in this case, therefore, an independent and non-conspiratorial model with which to compare the behavior of those accused of conspiracy. The defendants intended to rely heavily upon the argument which had been foreshadowed by the trial court itself in the colloquy as follows:

"Why shouldn't [the defendants] argue that this one large company, comprising a fourth or more of the market, you allege, behaving in very similar ways, has been declared by the Government to be a non-conspirator which helps to show that other people, behaving the same way, ought also to be viewed as not being conspirators?" (4528a)

The defendants asked the court to include in the charge a reference to the government's assertion of Parke, Davis' innocence. After the colloquy quoted from above, Bristol submitted a revision of the defendants' Joint Request

No. 43 which would have informed the jury that "[T]he prosecution has told us [that Parke, Davis] was not a member of the conspiracy charged, . . ."* This request was denied (4712a) and the information was not given to the jury, either in the form requested by the defendants or in any other form.

The charge as given merely referred to the fact that Parke, Davis had not been indicted and was not "alleged to be a conspirator". It thus withheld from the jury the information which the trial court itself had recognized was the key to the significance of the evidence.

By refusing to put this information before the jury, and by refusing as well to give the substance of the requested instructions which explained the defendants' theories as

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* Bristol Revised Request No. 43 was as follows:

"It is undisputed and I caution you to remember that Parke, Davis is a large manufacturer and seller of broad spectrum antibiotics. Parke, Davis had a patent on Chloromycetin during the period of the indictment and Chloromycetin made up a substantial portion of broad spectrum antibiotic sales.

"There is evidence that Parke, Davis, *which the prosecution has told us was not a member of the conspiracy charged,* used dosage forms similar to those used by defendants and had a pricing policy in which it attempted to meet the prices of the other sellers of broad spectrum antibiotics.

"You are entitled to consider the extent to which the evidence may show that Parke, Davis engaged in conduct which the government claims proves conspiracy, and the further fact that no one claims that this conduct by Parke, Davis was pursuant to the conspiracy claimed by the government.

"I caution you to remember these facts because it is very easy for a jury to concentrate only on the companies which are before it." (5604-05a) (emphasis added). See also Joint Request No. 43 (5186-8a); Cyanamid Revised Request No. 43A (5555a).

to the significance of the Parke, Davis evidence (5555a), the court declined to put an important defense theory of the case to the jury. This in itself was substantial harmful error.*

But the error did not stop there. After refusing to instruct the jury of the government's assertion on the record that Parke, Davis "absolutely was not" a conspirator, the court instructed the jury in such a way as to suggest that there might be some reason other than innocence for the failure to indict Parke, Davis. The court's language was (5002a):

> "However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis was not indicted."

This part of the instruction seemed to suggest a mystery, with which the jurors were not to concern themselves, as to the reason for Parke, Davis' status as a non-defendant. The Court of Appeals correctly said:

> "The charge as given could well have had the effect of stressing the failure to indict, thus carrying the connotation that Parke, Davis might have been guilty but was not indicted for undisclosed reasons." (12604a, 426 F.2d at 44)

The trial court concluded its discussion of this subject with an instruction to the effect that the verdict would have to be based upon the evidence as to the defendants' conduct alone. The language was (5002a):

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* *Sorrells* v. *United States*, 287 U.S. 435, 452 (1932); *Salley* v. *United States*, 353 F.2d 897 (D.C. Cir. 1965); *Perez* v. *United States*, 297 F.2d 12, 15-16 (5th Cir. 1961); *United States* v. *O'Connor*, 237 F.2d 466, 474, n. 8 (2d Cir. 1956); *United States* v. *Indian Trailer Corp.*, 226 F.2d 595, 598 (7th Cir. 1955); *Marson* v. *United States*, 203 F.2d 904, 912 (6th Cir. 1953); *Lutfy* v. *United States*, 198 F.2d 760, 762 (9th Cir. 1952).

> "Parke, Davis is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in the courtroom."

The clear import of this instruction was that, since Parke, Davis was not on trial and the defendants were on trial, the verdict must be based upon the evidence as to what the defendants did and not upon the evidence as to what Parke, Davis did. This completed the demolition of the argument which the trial court had previously recognized as an important one available to the defendants. The Court of Appeals concluded that it seemed "impossible to deny that the treatment which the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment" (12618a, 437 F.2d at 958-59).

B. The Erroneous Treatment of the Parke, Davis Evidence Was Seriously Prejudicial.

In the government's brief it is contended that in their summations to the jury the defendants did not make as much of the Parke, Davis situation as they might have (G. Br. 64). It is true that defense counsel felt handicapped in attempting to make use of this material, but this fact emphasizes rather than mitigates the harmful nature of the errors committed.

The court had refused to instruct the jury as to the government's assertion that Parke, Davis was not a conspirator (4712a), and indicated an intention to give the substance of the government's request on the Parke, Davis evidence (4646a), which stressed the irrevelance of the fact that Parke, Davis was not a defendant. The court had further given ominous, but not very clear, indications that the defendants would be limited in what they could say on this subject. There was reference to a "risk to which the

defendants ought to be peculiarly sensitive" (4646a). There was reference to the possibility that the court would stop defense counsel in their arguments if they went too far (4646a). In the same context the court said that it would "tell the jury that in the end the fact that some other party has not been indicted is not relevant to their determination of the guilt or innocence of these defendants who are on trial before them" (4647a). In these circumstances, defense counsel were, of course, quite circumspect in their use of this material in argument.

A further point made in the government's brief is that the jurors expressed interest in the Parke, Davis evidence and asked for and were given materials on this subject during their deliberations (G. Br. 72). However, this interest only tends to underscore the highly prejudicial effect of the instructions. Each juror had before him in the jury room a copy of the court's charge (5051a, 5060-61a). They were obviously looking at the charge because their request for materials on Parke, Davis was made by reference to a specific page of the charge (5071a). They may well have found that they could not do anything with a comparison between the conduct of Parke, Davis and that of the defendants because

1. they did not know whether Parke, Davis was in fact a conspirator;

2. they had been told that they should not speculate as to why Parke, Davis had not been indicted, which suggested the possibility that there was some reason other than innocence;

3. they had been told in the most emphatic terms that the non-indictment had "no relevance whatsoever in any direction"; and

4. they had been told that their verdict had to be based on the acts of the defendants which were on trial, and not on the acts of Parke, Davis which was not on trial.

Despite their obvious interest in the Parke, Davis story, the jurors were not in a position to give it the significance which it deserved.

In a circumstantial evidence case, in which an inference of conspiracy is asserted on the ground that certain specific business practices would not have been undertaken by the defendants in the absence of conspiracy, the fact that a company not engaged in conspiracy performed those same acts is a highly relevant and significant fact. The Court of Appeals did not exaggerate when it found that this evidence was "all-important to the defendants". It was clearly right when, on rehearing, it said:

> "[I]t seems impossible to deny that the treatment which the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment" (12618a, 437 F.2d at 958-59).

III

The Trial Court's Treatment of the Issues of Costs and Profits and Alleged Fraud on the Patent Office was Prejudicial.

Two aspects of the case were particularly likely to divert the jury from the true issues. These were the government's contention's that the defendants' prices and profits were "unreasonably high" and that Pfizer obtained the tetracycline patent through fraud on the Patent Office. Neither of these matters bore directly, if at all, on the critical issue of conspiracy, but each was high in emotional impact. There was great danger that the jury would be led to convict because of a belief that the defendants were profiteers or that Pfizer had engaged in misconduct in the Patent Office.

The Court of Appeals reviewed the evidence on these subjects with great care and examined the pattern of the trial both as to the government's use of the evidence and as to the court's treatment of it in charging the jury. The conclusion was that, in view of the nature of the evidence and the way it was treated throughout the trial, there was danger that the jurors were diverted from the true issue of conspiracy. This problem was pointed out in several passages of the majority opinion,* and was summarized as follows:

> "The jury thus entered upon its deliberations with its attention diverted from the real issues to patent fraud and unreasonably high prices—both inflammatory issues. Quite apart from their relevance, these so-called means and methods could well have so prejudiced the jury that it either failed to resolve the primary issue or subordinated it to the issues stressed. Because of this real possibility, defendants Pfizer, Bristol and Cyanamid are entitled to a new trial." (12602a, 426 F.2d at 43)

A. Constant Emphasis on Charges of "Unreasonably High" Prices and Profits Created a Damaging but False Issue in the Case.

In the Court of Appeals the defendants contended that the evidence concerning their costs was inadmissible. That court did not discuss or decide the question of admissibility. Its decision was rather that, quite apart from their relevance, these matters could well have been prejudicial (12602a, 426 F.2d at 43; 12618a, 437 F.2d at 959). Upon the petition for rehearing, the court again referred to "the undue emphasis on the excess of the selling prices over factory costs and the pattern which the trial took" (12618a, 437 Fed.2d, at 959).

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* 12593-94a, 426 F.2d at 38; 12595a, 426 F.2d at 39; 12598-99a, 426 F.2d at 41; 12600a, 426 F.2d at 41-42; 12601a, 426 F.2d at 43; 12618a, 437 F.2d at 959.

In the argument which follows we show the nature of the evidence and its lack of probative value, the circumstances which made the evidence inflammatory, the use made of the evidence by the government and, in the light of this, the trial court's prejudical treatment of the subject.

1. The Cost Evidence Had no Real Probative Value on any Issue Properly in the Case.

It is elementary that the question whether prices are reasonable is not an issue in a price fixing case under the Sherman Act. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

In *Trenton Potteries* the Court stated one ground of its decision as follows:

> "Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable —a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies" (273 U. S. at 398).

Indeed, there are decisions indicating that, even if there were an express legislative command, it would be unconstitutional to make the legality of business conduct depend upon so vague and subjective a standard as whether prices are unreasonably high.*

The only way in which the levels of prices and profits could have been made relevant in this case would have been to produce evidence tending to show that the prices and

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* *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921); *Weeds, Inc.* v. *United States*, 255 U. S. 109, 111 (1921); A. B. *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233 (1925); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 457 (1927). *Cf. United States* v. *National Dairy Prods. Corp.*, 372 U. S. 29 (1963).

profits were inconsistent with what would have been expected of a business being operated independently and without conspiracy. No such showing was made, and the evidence tended the other way.

Since the businesses of the defendants are operated for the purpose of making profits, the management of each company would necessarily seek to avoid business decisions and actions which would probably reduce profits. And all the evidence indicates that a price reduction by any of the defendants in the prescription market would in all probability have had just this effect. The failure to reduce prices, therefore, provides no support whatever for an inference of guilt.

The cost evidence principally relied on by the government in this case was particularly uninformative because it related to partial costs. The evidence as to Pfizer, for example, consisted of two groups of partial costs. The first consisted of bare production cost (GX's 841, 9176a; 1978-80a, 1999a). Among the costs omitted were those for general administration, distribution, selling and advertising, research and income taxes. In view of the obvious importance of research in this industry and the extensive organizations maintained for distribution and sales promotion, there can be no ques- that these omitted costs were very large in amount (1978-80a).

The second group of Pfizer's partial costs consisted of operating statements of the marketing division which sold the products (GX's 842, 870-71, 9269-73a, 10222-25a). They included some additional elements of cost but clearly did not take into account research expenses, general and administrative expenses or taxes (1982-84a). Moreover, they did not show costs on any individual dosage form. The "operating profits" calculated from these partial costs were therefore not the true profits of the company on any item.

As to the other companies, the government's evidence consisted in the main of partial cost studies. For some years

and for some products there were figures showing costs which were omitted from the Pfizer studies, but in the main the evidence consisted of partial cost tabulations which, because they were prepared on different bases, were not comparable with each other.

The government's failure to offer evidence as to total costs and total profits cannot be explained on the ground that such evidence was not available. During the grand jury investigation which led to the present indictment, each defendant supplied to the government cost studies, prepared on principles determined by independent public accountants, which showed total costs for each dosage form of each broad spectrum antibiotic (1986-90a). From these studies, actual profitability of each item could be ascertained. The government made no use of these studies, however.

It is argued that the defendants had it within their power to come forward with their own evidence of total costs (G. Br. 47). However, this argument is made in disregard of the fact that the government's burden of persuasion in a criminal case never shifts. Even where affirmative defenses such as insanity or entrapment are involved, once sufficient evidence is in the record to raise the question, the government has the burden of persuasion beyond a reasonable doubt on these issues as well as on all elements of the original offense. *Davis* v. *United States,* 160 U. S. 469 (1895); *United States* v. *Groessel,* 440 F.2d 602, 606-07 (5th Cir.), *cert. denied,* 403 U. S. 933 (1971); *Notaro* v. *United States,* 363 F.2d 169, 173-75 (9th Cir. 1966); 1 Wharton's *Criminal Evidence* § 13 (12th ed. 1955); 2 Wright, *Federal Practice and Procedure* § 403 (1969).

In the present case the government proved Pfizer's sales and some of its costs. However, there is uncontradicted evidence that Pfizer had other substantial costs which were not proven by the government but which the government admitted were in fact incurred (1978-79a, 4834a). Since

proof of the existence of profits requires proof that total costs were less than sales and since the government has failed to establish the extent to which Pfizer's total costs were less than this amount, it has not established that Pfizer had net profits which could in any way support the conspiracy charges.* *Stump* v. *Bennett*, 398 F.2d 111 (8th Cir.) (en banc), *cert. denied*, 398 U. S. 1001 (1968); *Government of the Virgin Islands* v. *Smith*, 278 F.2d 169 (3d Cir. 1960).

The principle that partial costs are no substitute for total costs was recognized in a monopolization context in *United States* v. *Aluminum Company of America*, 148 F. 2d 416 (2d Cir. 1945). Judge Learned Hand said:

> "[O]bviously it would be unfair to 'Alcoa' to take, as the measure of its profit on ingot, the difference between selling price and mill cost; and yet we have nothing else." (148 F. 2d at 427)

In attempting to justify its failure to use the total cost evidence, the government has asserted that the executives of each defendant were kept aware of their own company's production costs and that these costs had business significance. Of course, production cost have business significance, but they do not permit a businessman to ascertain the profitability of his enterprise. The government has also asserted that production costs have peculiar significance because they are inescapable costs of doing business. There is no

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* The government refers to the fact that when some of the tabulations showing total costs and profits were offered by defendants during the prosecution's case, their reception was postponed (G. Br. 48). The defendants, whose principal witnesses had already been called by the government, were seeking to round out their case during the presentation of the prosecution's case in order to shorten the trial. When Pfizer offered an exhibit on total costs and profits (which had been in the possession of the government for over seven years) it was excluded at that stage of the trial on the ground that the government needed more time to study it (1847-49a, 1988-90a).

showing, however, that other cost items, such as research, advertising, promotion and selling, were any less real or inevitable.

In addition to the fictitious nature of the profits asserted, another difficulty with the government's reliance upon the theory of excessive prices and profits is that no standard was provided in the evidence for determining whether the prices and profits were too high. The government made two efforts to suggest such a standard, neither of which succeeded.

One effort was by the introduction of a Federal Trade Commission Report on Profit Rates of Manufacturing Corporations, 1947-1962, which showed that company-wide pretax profits for companies classified under the heading "drugs" ranged from 17.1 to 23.3% of sales during the years 1956-1962 (GX 942, 10331a). These company-wide averages (which incidentally showed nothing at all as to gross or operating profits) were not a satisfactory standard because they included all kinds of products, new and old, patented and unpatented, prescription drugs and over-the-counter drugs, and in all probability products that were not drugs at all.* Moreover, no evidence as to the defendants' company-wide net profits was introduced so that there is nothing in the record with which to compare the figures in the FTC report.

The second effort to establish a standard of comparison consisted of evidence from which it was argued that the defendants' profits on broad spectrum antibiotics were "abnormal" (GX's 852, 986a; 854, 9932a). In this connection the government pointed to the difference between the gross margins of Squibb and Upjohn, which it characterized as

* The companies in the study included corporations "primarily engaged in manufacturing, fabricating, or processing medicinal chemicals and pharmaceutical products; and in the grading, grinding, and milling of botanicals" (GX 942, at 10384a). All the sales and profits of each company were included, whether or not they were drug sales and whether or not they were made in the United States.

"normal" for the drug industry, and those of the defendants, which it characterized as well above the industry "norm". A basic defect in this position is that Squibb and Upjohn as bulk purchasers would necessarily have lower gross margins than the manufacturing companies. Moreover, the only "norm" pointed to was testimony that the *average* gross profits for the drug industry were between 55% and 70% of sales and that at least this much gross profit was probably needed to make any net profit at all (2900a, 3175-76a). There is no logic or justice in saying that the gross margins on such outstanding products as tetracycline should be held to anywhere near the industry average, which necessarily includes all kinds of products, including some unprofitable ones. The only significant comparison could be with other patented products and with trademarks having wide acceptance among the medical profession.*

As a matter of fact, the evidence disproves the government's theory in the case of Pfizer. A table showing the percentages of "gross profit" and "operating profit" on all Pfizer prescription drugs introduced during the indictment period established that the broad spectrum antibiotics were not out of line with the other products. Some of the other products yielded higher margins than did Terramycin or tetracycline (4584-88a; PX 641, 12582a).

For these reasons, the comparison (G. Br. 47) between Pfizer's "operating profits" on broad spectrum antibiotics and those on its products as a whole is not valid. The entire group of products included many drugs which no one would seriously contend could be expected to be as profitable as "the wonder drugs". And, as has been shown, there were several Pfizer products which produced more "operating profit" than the broad spectrum antibiotics.

The importance of limiting profit comparisons to situations that are truly comparable was recognized by this

* The fact that penicillin was not patented made it not comparable to broad spectrum antibiotics for this purpose.

Court in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956), a monopolization case. There the evidence related to net profits after taxes earned by du Pont on cellophane. The Court said:

> "Nor can we say that du Pont's profits, while liberal (according to the Government 15.9% net after taxes on the 1937-1947 average), demonstrate the existence of a monopoly without proof of lack of comparable profits during those years in other prosperous industries. Cellophane was a leader, over 17% in the flexible packaging materials market. There is no showing that du Pont's rate of return was greater or less than that of other producers of flexible packaging material." 351 U. S. at 404*

In the lower courts the government has suggested three rationalizations for the use of the evidence as to costs and profits. None of these would justify the broad use actually made of the evidence at trial, and none of them presents any substantial basis for concluding that the evidence had probative value.

1. *Motive.* The government has claimed that the cost evidence helped to show the importance of broad spectrum antibiotics profits to the defendant companies and therefore was evidence that they had a motive to conspire. However, there was no dispute about the importance of the products to the defendants; they themselves asserted the importance of these products to them. Comparative sales figures are all that is needed to make the point. From these figures it is clear that a 10% reduction in broad

* The government also argues that the cost evidence was admissible to prove that the defendants had monopoly power (G. Br. 42). However, as the quotation from the *du Pont* case in the text makes clear, such evidence is of no value in a monopolization case without a proper standard for comparison. No such comparison was supplied in this case. Moreover, the admission of the evidence on the monopoly power issue could not justify use of it on the conspiracy issue where it had no probative value.

spectrum antibiotics prices, for example, would have meant a tremendous reduction in Pfizer's total dollar sales (GX's 877, 10246a; 879, 10248a). Thus, the cost evidence added nothing to the government's case. Moreover, the importance of products to a company would, in the absence of conspiracy, provide it with strong motives not to make self-defeating price reductions, issue licenses or make bulk sales.

2. *Alleged Declines in Costs.* The government has argued that the cost evidence shows declines in costs over time which, in the absence of conspiracy, would have resulted in reductions in the defendants' list prices (4848a, 4852-53a).

The cost evidence as to Pfizer, though incomplete, made the following points very clear:

a. Pfizer's production costs fluctuated slightly both upwards and downwards during the indictment period; from one accounting period to another there were five instances of decline and five of increase. The first decline which could be said to indicate a trend occurred in 1960, which was Pfizer's first full year of production by direct fermentation (1188-90a; GX 841, 9176a). As it happened, Pfizer reduced its list prices to direct retailers and private hospitals by 15% in 1960 (GX's 841, 9176a; 866, 10161a).

b. The small variations in Pfizer's production costs and even the change which occurred in 1960 could not have had much effect on its total costs or net profits (GX 841, 9176a).

c. There were instances where differences in production costs were not large enough to compensate for variations in other partial costs (GX's 841-42, 9176-273a; PX's 637-40, 12571-81a).

d. Although the "operating profits" on the company's tetracycline products, as percentages of their sales, increased during the period 1957 through 1960,

this increase was even less than the decrease in "operating profits" for Terramycin (PX 641, 12582-83a).*

3. *Variations in Costs Among the Alleged Conspirators.* The government also argued that the evidence showed variations in costs among the alleged conspirators which in the absence of conspiracy would have led to price reductions in the prescription market. Specifically, it was argued that since the defendants' production costs were significantly lower than those of Squibb and Upjohn, in the absence of conspiracy Pfizer or Cyanamid would have made predatory price cuts either to drive those companies out of the market or to prevent their market shares from growing (4848a, 4853a, 6508a).

Apart from the questionable legality of the course suggested by the government, this argument depends on the assumption that Bristol would not have reduced its bulk price in order to make it possible for Squibb and Upjohn to survive. In view of Bristol's dependence on its sales to Squibb and Upjohn, this assumption is unwarranted; as the government admits, "the continued existence of Bristol de-

* The partial cost data as to the other defendants also can not support the government's contention that they would have reduced prices in the absence of conspiracy. After the first year or two the production costs of both Bristol and Cyanamid were about as stable as Pfizer's (GX's 837, 9051a; 844, 9279a; 845, 9338a), and had little effect on the total costs of those companies.

Bristol's "adjusted profits" on its own label sales of tetracycline (Polycycline) were relatively stable and its "adjusted profits" on its phosphate complex products (Tetrex), upon which it principally relied, stabilized at a lower level after they had become established on the market (GX's 192, 8759a; 838, 9139a).

The evidence as to the relative profitability of Cyanamid's products is incomplete as to various years and was not calculated on a consistent basis, so that no meaningful year by year comparison of its "profits" on tetracycline can be made. (*Compare* GX 852, 9862a *with* GX 854, 9932a).

There is no evidence showing variations in total costs on specific products for any defendant over the relevant time period.

pended on its ability to sell bulk tetracycline to Squibb and Upjohn" (G. Br. 19). In fact, Bristol did reduce its bulk price to those companies when they met Pfizer's 1960 price reductions.

Moreover, any suggestion that, in the absence of conspiracy, Pfizer would have made a predatory price cut aimed at Squibb and Upjohn depends on the further assumption that Pfizer would have expected to benefit financially from such a move. This is most unlikely, however, since any price cut deep enough to have driven those companies out of the market would have reduced total revenues so drastically as to reduce Pfizer's profits. When the fact that there is no evidence that Pfizer had any way of knowing what bulk price Bristol was charging Squibb and Upjohn is added to all this, it is clearly illogical to argue that an inference of an unlawful Sherman Act conspiracy should be drawn from Pfizer's failure to engage in intentional predatory pricing.

In support of its theories that costs had probative value in establishing conspiracy, the government relies upon certain cases where, in considering the sufficiency of the evidence of conspiracy, courts referred to the relationship between costs and prices (G. Br. 40-42). However, with the exception of the *Lilly* case referred to below, none of the authorities cited involved markets having the characteristics of the prescription drug market. Moreover, none of the cases dealt with the situation where the defendants had supplied the government with a more complete form of cost evidence such as the accounting tabulations supplied in the present case. Finally, none of the cases involved the question of admissibility of inflammatory evidence of production or other partial costs in a setting where the prosecutor's evidentiary theories logically depended upon total costs.

The reliance on *United States* v. *Eli Lilly & Co.*, 24 F.R.D. 285, 291, 293 (D. N.J. 1959), is also misplaced. In

that case, the court granted a government motion under Rule 17(c) of the Federal Rules of Criminal Procedure for the issuance of a subpoena compelling the production of documents prepared for the purpose of aiding in pricing by defendants—documents which included evidence of costs. This was done on the theory that cost evidence might have some "liminal" relevance. 24 F.R.D. at 291. This opinion on pretrial discovery is of little significance because the court refrained from passing upon and very carefully reserved until trial the question of the admissibility of the evidence. What is significant about the *Lilly* case is that the cost evidence had so little probative value that the government attempted to use it only to impeach one witness, and it was not considered important enough to be mentioned in the exhaustive opinion granting a motion for acquittal at the close of the government's case. 1959 Trade Cas. ¶ 69,536 (D. N.J. 1959).

2. The Evidence as to Costs and Profits Was Used in a Setting in Which It Was Likely to be Highly Prejudicial.

Both before and during the trial the public was subjected to a barrage of publicity emanating from hearings conducted by Congressional committees, the gist of which was that drug companies generally were guilty of gouging the public. The record contains an extensive showing of the nature and effect of this publicity.*

For example, hearings in 1959 before the so-called Kefauver Subcommittee** resulted in headlines such as the following:

> "Drug Quiz Charges 1,118 per cent Mark-up" (1266a)
> "Senate Panel Cites Mark-up on Drugs Ranging to 7,079 per cent" (1266a)

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* *See, e.g.*, 5635-6278a.

** The Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate under the chairmanship of the late Senator Estes Kefauver.

"Senate Probe Reveals 1000% Drug Mark-Up" (5657a 5658a, 5660a, 5662a)
"7000 P.C. Mark-Up Charged in Drugs" (5668-70a).

These "mark-ups" (which were reached by ignoring the greater part of the companies' costs) did not relate to antibiotics or to the prices of any of the defendants, but the stories were generalized to apply to the whole drug industry. In subsequent hearings, the Kefauver Subcommittee turned to the subject of antibiotics. The resulting publicity was extensive (5825-35a). During the years which followed, this harmful publicity did not abate (5836-55a).

Shortly before the beginning of the trial, other hearings were held by the House Committee on Activities of Regulatory Agencies and by the Senate Finance Committee. Both of these involved charges of "high" drug prices, including prices of tetracycline (5647-48a).

The campaign was even carried on during the trial. Over Pfizer's protest, a Subcommittee of the Senate Select Committee on Small Business conducted hearings on drug prices including the prices of tetracycline and other broad spectrum antibiotics. The most highly publicized of these hearings occurred on the last day on which evidence was taken in this trial (5504-29a).

These hearings during the trial resulted in much publicity adverse to the drug industry, as is evidenced by headlines such as the following:

"Panel Hears Aged Face Choice Between Buying Food or Drugs" (6114a)
"Fight Against High-Price Prescription Drugs" (6092a)
"60% of Rx Drug Bill Called Unnecessary" (6135a).

On the evening before the jury retired to deliberate in this case, a cartoon appeared in the *New York Post* depicting pharmaceutical houses as profiteers shaking down pur-

chasers of brand-named drugs and captioned: "Surely you've heard of the instructions to 'shake well before using.'" (5628-29a).

The inflammatory nature of this campaign against drug pricing is obvious, and was the subject of affirmative proof. Shortly after the first Kefauver hearings, *The Washington Star* reported the findings of a national public opinion poll that most Americans thought the government should take action to control prescription drug prices (5764a). Even more significant findings resulted from a public opinion poll taken by Roper Research Associates, Inc. (6279-323a). This poll was taken at Pfizer's instance for use on post-trial motions in this case. It was based upon interviews with a scientifically selected sample of the population from which the jury was drawn. The poll showed that an overwhelming majority of people believed drug prices and profits were unreasonably high. The Roper poll further demonstrated that, in popular opinion, the selling price of prescription drugs ought to be only modestly above bare production cost. Eighty-eight percent of the sample believed that if bare production cost was $3.00 an ultimate selling price of $10.00 would be "excessively high" (6285-86a, 6296a).

3. The Government's Use of the Materials on Costs and Profits Was Prejudicial.

Throughout the case the government placed major emphasis on the charge that the defendants' prices and profits were unreasonable, and this emphasis tended to obscure the fact that the crime charged was conspiracy.

In the indictment itself, while the charge of conspiracy is made in very few words, the draftsmen found at least fifteen places where reference could be made to "unreasonably high" prices or profits (Ind. ¶¶ 37, 42, 46(j) 46(k), 47(a), 47(b), 47(c), 47(d), 47(e), 49, 52, 53, 55, 57, 58;

31-32a, 34-40a). The Justice Department's preoccupation with questions as to the fairness of prices carried over into its public accouncement of the indictment. Although there was reference to the charge of conspiracy in the text of the announcement, the topic sentence which set the tone of the whole announcement was:

> "Three of the nation's largest manufacturers of antibiotic 'wonder' drugs were indicted today *on charges of maintaining unreasonably high and non-competitive prices* and monopolizing the production and distribution of the drugs since November, 1953" (314a) (emphasis supplied).

At an early stage of the case, the defendants moved that the allegations concerning "unreasonably high" prices and profits be stricken from the indictment as surplusage so that the invitation to go into the fairness of defendants' prices would not be tendered to the jury (303-05a). This motion was denied (356-60a, 217 F. Supp. 199).

Throughout the trial government counsel hammered away at a comparison between production costs and selling prices, and even made matters worse by constant references to the selling prices of retailers which were, of course, much higher than the prices at which any defendant ever sold.

The following passage from the government's opening to the jury shows how this theme was developed.

> "In 1954, it cost Cyanamid $2.55 to produce 100 capsules, 250 milligrams each of tetracycline.
>
> "In 1956 it cost them $1.76.
>
> "In 1958 it cost them $1.59.
>
> "They were selling to the druggist at $30.60 and the consumer was paying $51 for it.
>
> "In 1954, Pfizer's production costs were $3.87. In 1956 it was $3.08. In 1958 it was $3.24 and in 1960 it dropped to $1.70. The price to the druggist was $30.60. I am talking now of the entire period for all these companies. The price to the consumer, $51.

"The price to Bristol in the beginning was high. It was $9.01 in November of 1954. In 1956 it was $1.98. In 1958 it dropped to $1.91 and in 1960 it dropped to $1.62. The price to the consumer, $51. The price to the druggist, $30.60 during the entire period, the same price.

"The price to Upjohn, the cost to Upjohn, rather, $12 in 1954. $9.86 in 1956. $9.39 in 1958. $7.98 in 1960. The price to the druggist, $30.60. The price to the consumer, $51.

"Note the difference. Cyanamid's cost, $2.55. Upjohn's, $12 and something. The same price by both parties.

"Now, to finish it out, Squibb in 1958, cost $9.58. In 1960 $7.71 cost. Price $30.60 to the druggist. $51 to the consumer. Same price during the entire period.

"What does that mean? Squibb and Upjohn, high-cost producers, were able to make a fair, normal profit under a price schedule, a fixed price schedule we say, which returned enormous profits to the other three companies and particularly enormous profits to Pfizer and Cyanamid, which were big in the package market, and huge bulk profit to Bristol, which was engaged in selling bulk to Squibb and Upjohn." (1497-98a)

The defendants moved for a mistrial at the close of the government's opening on the ground that it invited the jury to base a verdict on its view of whether prices and profits were fair and reasonable, but the court denied the motion (1506-08a).

In the summations to the jury government counsel similarly stressed the claim of "unreasonably high" prices and profits, using the same kinds of evidence (4833-37a, 4847-48a, 4850-54a, 4862a, 4906a, 4909a).

The following are a few examples of the way in which prices and profits were used in the summation:

"Do you know what flows from that then? That when the prices are as high as they are here compared to

production cost, *then the profits that flow from those prices are unreasonably high profits.*" (4847a)

• • • • •

"In 1954 it cost Cyanamid $2.26, in 1955 it cost them $1.57. That listed for $51. The druggist paid $30.60. *2,000 percent markup.* Pfizer, $3.87, selling it to the druggist at $30.60, *roughly nine times as much.* In 1960 it is down to $1.70, and there we have *about 18 times as much.* There is Bristol, in 1956, $1.98, selling for $30.60. $1.67 in 1957 selling for $30.60. $6.24 in 1954, selling for $30.60." (4851a)

• • • • •

"I think it is a fair inference from this chart that Cyanamid and Pfizer and Bristol starting in 1956 *were making an unreasonably high profit.* I don't think there is much doubt about that." (4852a)

• • • • •

"you have seen what the costs were, you have seen *the unreasonably high profits involved. . . .*" (4854a)

• • • • •

"it was up to Pfizer . . . to continue maintaining prices at *these profits* that I have already shown you." (4862a) (emphasis supplied in each instance)

These were not logical arguments giving reasons why the defendants' prices would have been reduced in the absence of conspiracy. They rather stressed, as a fact in itself, the claimed unreasonableness of profits basing the claim upon evidence which could not possibly show the levels of profits at which any of the defendants sold any of their broad spectrum antibiotic products.

Although the Court of Appeals did not decide the question of admissibility of the evidence as to costs and profits, the use made of such evidence in this case should be considered in the light of the general rule that highly prejudicial evidence should not be admitted when its probative value is limited. This rule is stated by McCormick, who

lays down "several counterbalancing factors which may move the court to exclude relevant circumstantial evidence if they outweigh its probative value." The first two "in order of their importance" are peculiarly applicable here:

> "First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues." (McCormick, *Evidence* 319 (1954))*

Such considerations should surely have led the trial court to take effective action to prevent the use of the evidence as an appeal to emotion. This, unfortunately, was not accomplished.

4. The Trial Court's Instructions Permitted, and Perhaps Encouraged, the Jury to Decide the Case on Their Views as to the Fairness of the Defendants' Prices and Profits.

The true issue in the case was whether the defendants had conspired as alleged in the indictment. The question whether their prices and profits were too high had no direct bearing on this issue. Moreover the case was tried in an atmosphere which was not conducive to rational and proper evaluation of the evidence as to costs and profits. This

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* See *Herman Schwabe, Inc.* v. *United Shoe Mach. Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied*, 369 U. S. 865 (1962); *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.*, 315 F.2d 449, 459 (1st Cir.), *cert. denied*, 375 U. S. 820 (1963); *United States* v. *Mullings*, 364 F.2d 173 (2d Cir. 1966); *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F.2d 629, 633 (2d Cir.), *cert. denied*, 344 U. S. 875 (1952); *Hartman* v. *United States*, 215 F.2d 386, 391, 394 (8th Cir. 1954); *Frank* v. *United States*, 262 F.2d 695, 696-97 (D.C. Cir. 1958). *See also Pevely Dairy Co.* v. *United States*, 178 F.2d 363, 371 (8th Cir. 1949), *cert. denied*, 339 U. S. 942 (1950); 1 Wharton, *Criminal Evidence* § 166 at 321, n.4 (12th ed. 1955). *Cf. Shepard* v. *United States*, 290 U. S. 96 (1933).

atmosphere had been created, and was added to during the trial, by the widely publicized assertions of governmental representatives as to the unfairness of drug pricing generally and of antibiotics in particular.

For these reasons, if the evidence was to be in the case at all, it was necessary that great care be taken to guide the jury in their consideration of this evidence and to guard against its misuse. The Court of Appeals concluded, from its study of the whole charge and the whole record, that the proper precautions were not taken and that the jury's attention was diverted from the real issues to the question whether prices were unreasonably high.

The court began the trial with a preliminary admonition to the jury, which constituted their introduction to the case. The defendants asked the court not to refer in its admonition to characterizations such as "unreasonably high" as applied to prices (1296a). This request was not followed. The court described as one of the means and methods of the alleged conspiracy "the maintenance of identical noncompetitive and unreasonably high prices in its tetracycline products", and also summarized the alleged effects of the conspiracy as including "the creation of uniform non-competitive and unreasonably high prices to the users of broad spectrum antibiotics . . . ." (1468a).

The admonition did not give the jury any guidance as to the possible relevance of the "unreasonableness" of the defendants' prices and profits. It merely told the jury that one of the things involved in the case was a claim of unreasonably high prices. This admonition set the stage for government counsel's emphatic use of the charge that prices and profits were unreasonably high in the opening statement to the jury, throughout the trial and in the summation.

The charge to the jury on this subject started with proper instructions to the general effect that the jury was not to

be influenced "by any notion that drug prices were too high or too low or even just right" (4994a). The effect of this advice was seriously impaired, however, by further instructions on the subject.

The court suggested that the jury weigh the question of reasonableness in terms of certain new definitions, saying:

> "In the light of what I have just said, I think you will find it helpful to translate the word 'unreasonable' to mean 'unusual' or 'artificial' or 'extraordinary.' By these suggested definitions I am trying to convey the thought that the idea of unreasonableness in the present context is meaningful only if it is understood to refer to kinds of price behavior or price levels which appear to be divorced from variations and differences in available supply or demand or cost or other economic factors that may normally be expected to cause variations or changes in the prices charged in a competitive market.
>
> "To put the thought in another and slightly shorter way, the charge of unreasonableness in this case is material only insofar as it poses the issue whether the prices involved exhibit qualities or peculiarities of a type that could be deemed evidence that such prices resulted from agreement rather than from competition" (4994-95a).

There are at least three reasons why these new definitions failed to accomplish the court's purpose.

First, the jury was given no basis for deciding what these new words meant in the context of this case. To know what was "unusual" or "artificial" or "extraordinary" the jury would have to know what was usual, unartificial or ordinary in the pricing and marketing of comparable prescription drugs. The court gave the jury no guidance on this point, and did not refer to the evidence indicating that in the circumstances of this case there were no economic reasons why any defendant could have expected to benefit by a list price reduction in the prescription market.

Second, the charge allowed the jury to focus on the cost evidence, including the evidence of production costs, and to apply as a model for comparison, perhaps standards drawn from markets with many sellers, no patent barriers, no anti-substitution laws and elastic demand, standards completely inapplicable to the broad spectrum antibiotic market. The court mentioned certain economic factors which in its view might "normally be expected to cause variations or changes in the prices charged in a competitive market" (4994a), but did not refer to any factors (which were shown in the evidence), that might normally be expected to militate against variations or changes in prices.

Third, the definitions came after several weeks of trial and after the government's summation, in which the question of the fairness or reasonableness of prices and profits was continually presented as a relevant consideration and was stressed in terms of a fictitious "profit" over bare manufacturing cost.* Nothing had been done at any stage of the trial to inform the jurors that the question of fairness was not before them or to give them the definitions quoted above.

The crucial importance of the question whether the jury was able to apply the definition of "reasonableness" given them at the end of the trial is clear when one considers the emphasis given by the court to the significance of unreasonable prices and profits. The jurors were told that "unreasonably or extraordinarily high prices or profits charged uniformly by competing sellers over a substantial period of time" may be evidence supporting an inference of conspiracy (4998a). Almost immediately after this they were

* These special definitions were ineffective to prevent the jury from accepting the improper comparisons relied upon by the government between bare production costs and selling prices. For, although the court referred to the fact that other costs should be taken into account in computing net profits, it expressly allowed the jury to consider relationships between production costs and defendants' prices in considering the conspiracy issue (4996-99a).

told that "unreasonably high profits" were relevant to the issue of conspiracy to monopolize and actual monopolization (4998a). This gave special emphasis to the claim of unreasonably high prices and profits.

During the whole trial the assertion that prices and profits were too high had been put before the jury without any special definitions so that the jurors were left to consider the evidence in the light of their subjective views as to the fairness of prices and profits. Asking them to switch mental gears at the end of the trial and to give the terms "unreasonably high prices" and "unreasonably high profits" a new meaning not used in ordinary parlance and different from the meaning used throughout the trial was asking too much.

The entire charge on costs and profits was objected to by the defendants but the court refused to make any corrections in it (5026-27a, 5028-31a, 5038-41a, 5042-45a, 5291-96a, 5297-303a).

In a criminal case particularly, defendants are entitled to clear and lucid instructions on important points, not confusing ones. The test is "whether the instructions were sufficiently clear and whether it was reasonably possible for the jury to follow them." *Delli Paoli* v. *United States*, 352 U. S. 232, 239 (1957), *overruled on other grounds*, *Bruton* v. *United States*, 391 U. S. 123, 126 (1968). What is required is:

> "an explicit, *unambiguous* statement of the issue of fact to be decided by the jury, supplemented by a brief description of the rules of law, intended for the guidance of the jury . . . all in words readily *understood by laymen*, without the confusion of digressions and the unnecessary use of legal jargon." *United States* v. *Christmann*, 298 F.2d 651, 653 (2d Cir. 1962) (emphasis supplied).

See also Bollenbach v. *United States*, 326 U. S. 607, 612 (1946).

The defendants were entitled to have a trial in which the jury would be kept as far away as humanly possible from the unconstitutionally vague question whether prices were "unfairly high." The Court of Appeals was correct in concluding, in light of the pattern of the whole trial, that this was not accomplished.

B. The Jury Might Have Been Diverted from the True Issues of the Case by the Government's Allegations that Pfizer Committed a Fraud on the Patent Office.

Most of the government's evidence about Patent Office matters related to Pfizer's successful *ex parte* efforts in the fall of 1954 to have a patent on tetracycline issued to it (*See, e.g.,* 3889-4410a). Through this evidence the government was attempting to prove that Pfizer had obtained the patent by fraud.

Pfizer continues to assert that the charge of fraud was unfounded. Before the Court of Appeals a full showing was made of the company's position that there was no misconduct in the prosecution of its application for a patent on tetracycline. That court did not reach the question of the sufficiency of the evidence to establish fraud, and based its decision on other grounds. Accordingly, we will not lengthen this brief by discussing this complex and sharply contested issue, and will address ourselves only to points decided by the Court of Appeals.

A primary effort by the government was to prove the charge in the indictment that fraud on the Patent Office was an agreed means by which the alleged conspiracy was effectuated. Late in the trial, however, government counsel conceded that no evidence of conspiracy to defraud had been produced, saying:

> "If we could show a conspiracy to defraud the Patent Office that would be fine and maybe some-

thing will come up that will show it. I don't know" (4135a).

Nothing did come up to show it, and in this state of the record Pfizer's motion to strike the evidence should have been granted (4485-515a, 5316-39a, 5477-88a).

Nor was Pfizer's conduct of the *ex parte* proceedings in the Patent Office probative of the alleged conspiracy to exclude competitors or to fix prices. The proceedings in question were secret, and remained so until the patent issued. No other company had any involvement in these proceedings and there is no evidence that any of them had any knowledge thereof. In this setting, Pfizer's conduct in the proceedings did not tend to indicate the existence of any conspiracy. Pfizer had an obvious and independent interest in obtaining a patent, and the nature and quality of its acts directed to that end do not signify anything as to its relations with other companies.

Apart from the lack of probative value, the evidence was diversionary because of its extremely technical nature and was prejudicial because of the very nature of a charge of fraud.

This evidence involved lengthy inquiries concerning a wide variety of arcane subjects, including, *inter alia:*

—how motion practice is conducted in patent inferences;

—how rejections by patent examiners are made and what they are and can be based upon;

—what is involved in the concept of "prior art" as it is known in the patent field;

—the meaning and significance of pH in fermentation processes;

—the relative efficacy of the Pidacks, Craig countercurrent, Florosil, and paper chromatography techniques;

—what is meant by a recovery procedure in microbiological circles;

—the significance of mutations among strains of *Streptomyces aureofaciens*;

—how potency is measured in fermentation broths;

—the interrelationships between concurrent prosecutions of complicated patent applications; and

—many other similarly technical subjects.

The best demonstration of the inflammatory nature of the accusation is in the use actually made of it in the prosecution's summation. Government counsel explained to the jury why he intended to go fully into this subject saying:

> "Well, I shall take a little time to go into some detail; since it reflects upon the personnel involved in some way, it must reflect the charges are misleading and withholding information before the Patent Office and anyone guilty of that certainly has a reflection cast on them and therefore I think I shall go into a little detail." (4883a)

The Patent Office evidence was such a big and complex case in itself that even without any claim of fraud it might well have distracted the jury from the true issues in this case. When to this is added the fact that the prosecution stressed the evidence because of the "reflection" cast upon the persons involved, it seems clear that the Court of Appeals was right in saying that the case was "virtually diverted from an antitrust conspiracy case to a patent fraud case" (12599a, 426 F. 2d at 41).

Because of the conceded failure of the government's attempt to prove conspiracy to defraud the Patent Office and because of the lack of probative significance in the evidence as to Pfizer's proceedings in the Patent Office, this matter should not have been submitted to the jury at all. It was submitted quite fully, however. The overall effect of this part of the case was included in the Court of Appeals' statement that the evidence

> "could well have so prejudiced the jury that it either failed to resolve the primary issue or subordinated

it to the issues stressed. Because of this real possibility, defendants Pfizer, Bristol and Cyanamid are entitled to a new trial" (12602a, 426 F. 2d, at 43).

IV

The Trial Court's Errors with Respect to Bristol's Alleged Conspiracy with Pfizer and Cyanamid.

The Court of Appeals found that the trial court committed two basic errors with respect to the evidence as to Bristol's alleged entry into conspiracy with Pfizer and Cyanamid. First, the charge of the court relating to the licensing agreements made by Pfizer with Bristol, Squibb and Upjohn improperly characterized them as restrictions on Squibb and Upjohn, and virtually directed a finding of conspiracy between Pfizer and Bristol. Second, the trial court seriously undercut a major part of the defense case by refusing defendants' requests to charge concerning the significance of the conduct of Pfizer and Cyanamid before November 1953 (5151-52a, 5536a) and the conduct of Bristol prior to December 1955 (5195-96a, 5587-88a) and by cutting the jury free from any temporal restrictions (4963-64a). These points are covered in greater detail in the brief submitted by Bristol, and there is no need for repetition. Here we merely emphasize that these errors were prejudicial to Pfizer.

These errors tended to move the jury towards a finding that Pfizer conspired with Bristol. They therefore were adverse to both these companies. Moreover, a finding of conspiracy as between Pfizer and Bristol would, as a practical matter, have made it substantially easier for the jury to take the further step of finding conspiracy between Pfizer and Cyanamid. Accordingly, any errors relating to Bristol's alleged entry into conspiracy with Pfizer were as prejudicial to the other defendants as to Bristol.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 15, 1971

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-72

UNITED STATES OF AMERICA, PETITIONER

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondents seek to uphold the court of appeals' rulings that various alleged errors in the trial court's charge denied them a fair trial by focusing on particular words and phrases whose meaning and significance they view in isolation without considering either the charge in its entirety or the total picture of the lengthy trial—the same error that the court of appeals committed in reversing the convictions.

a. For example, respondents point to the instruction that the jury had heard each of the principal officers of the three defendant companies

> deny in broad terms that there was any understanding or agreement among them, either ex-

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> press or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. * * * [5000a]

Treating the words "in broad terms" as meaning "generally," they argue that, contrary to the court's statement, their officers did not merely make general denials that they had entered into such agreements or understandings, but explicitly and in detail gave all the facts surrounding the meetings and agreements and, with equal detail and specificity, denied the existence of agreements or understandings.

In light of the extensive testimony in which the respondents' officers had denied having any agreements or understandings, the trial court's words "in broad terms" were intended to, and did, convey to the jury the point that those denials were extremely comprehensive.

The respondents' officers had given two types of testimony: an explanation of the business reasons for their decisions, and also denials that those decisions were the result of an agreement or understanding. Many of these denials were no more than a negative answer to a question tracking the language of the indictment.[1] The trial court's instructions

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[1] Thus, the cross-examination of McKeen, Pfizer's President, by Pfizer's counsel (2734a–2735a) contained this passage:

> Q. Now, Mr. McKeen, I have some final questions I want to ask you, and as to these there is no time limit, you can come from the beginning of time down to today.
>
> To your knowledge, or according to your information, was there ever any agreement or understanding of any

treated these two types of testimony separately. With respect to the "explanatory" testimony, the court pointed out in its opinion denying a new trial (6462a, 281 F. Supp. at 848):

> The court's instructions contained repeated reminders that the actions taken by the defendants were entirely lawful if taken independently; that the jury was to consider whether the evidence reflected only normal, independent, self-interested, and lawful business conduct, or unlawful conspiratorial action; and that the essential and pervasive question was whether the government's charge of conspiracy had been proved (Tr. 6197, 6200–01, 6202–03,

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kind among Pfizer and/or Cyanamid and/or Bristol and/or Squibb and/or Upjohn that the manufacture of tetracycline be confined to Pfizer, Cyanamid and Bristol? A. Absolutely not.

Q. Was there any such agreement or understanding with any of those parties that the sale of tetracycline, of tetracycline products, be confined to Pfizer, Cyanamid, Bristol, Upjohn and Squibb? A. None whatsoever.

Q. Was there any agreement or understanding of any kind with any of those parties that the sale of bulk tetracycline be confined to Bristol and the bulk tetracycline be sold by Bristol only to Upjohn and Squibb? A. None what—no, absolutely not.

Q. Was there any such agreement with any of those parties that the sale of broad spectrum antibiotics by the defendant companies and the so-called co-conspirator companies be at substantially identical and non-competitive prices? A. No, absolutely not.

See also 2365a–2366a, 2373a, 2374a–2375a, 2428a–2429a, 2562a–2564a, 2758a–2759a, 2774a–2775a, 2850a–2851a, 3081a–3082a, 3846a–3847a.

6206–07, 6208–09, 6212–14, 6221–22, 6223–24, 6225–26, 6227, 6231–32, 6245–46, 6250, 6251, 6256–57, 6258–59, 6260, 6261, 6263, 6265, 6266–67, 6269, 6284). These references had the obvious purpose of reminding the jury of the detailed accounts and explanations given by defendants' officers concerning the events in question. * * *

The court also charged that "In weighing the significance and meaning of the meetings in this case, you will consider the extent to which you have heard legitimate business purposes for them * * *" (5000a).

The jury also had to be instructed on how to appraise the officers' denials of agreement. On this point the district court stressed (5000a-5001a), as this Court's decisions require, "that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter." See, *e.g.*, *United States* v. *Gypsum Co.*, 333 U.S. 364, 396; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809–810; *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 195; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44; *United States* v. *General Motors Corp.*, 384 U.S. 127, 141–142.

Respondents argue that the latter instruction invited the jury to decide the legal question of what constitutes an agreement under the Sherman Act. That issue was not left for the jury to determine—the court instructed in detail on the meaning of conspiracy and agreement (4950a–4953a). The jury was

required only to evaluate the credibility of the witnesses' testimony denying agreement against the witnesses' possible misapprehension of the nature of agreement or understanding as used in the allegations they were asked by their counsel to deny. As the trial court observed, in a circumstantial case such as this, such denials involve more than "a mere question of 'fact' to be decided by a simple minded judgment as to whether a witness 'lied' when he proclaimed innocence" (6465a, 281 F. Supp. 837, 850).

b. Another example of the respondents' failure to evaluate the charge in context is Bristol's argument (Br. 23–26) that the district court misinterpreted Pfizer's licenses to Squibb and Upjohn.

The indictment charged (Par. 46(i), 35a) that "Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of Tetracycline Products." The district court correctly told the jury (see *United States* v. *Krasnov*, 143 F. Supp. 184 (E.D. Pa.), affirmed *per curiam*, 355 U.S. 5) that

> There is nothing wrongful in itself in the fact that the licenses issued to Squibb and Upjohn were requested by Bristol as part of Bristol's privileges and obligations under its arrangements with Squibb and Upjohn for the settlement of the litigation. The critical inquiry on this score is whether the limitation on Squibb and Upjohn, which barred them from manufacturing, was the particular objective of Bristol and was an agreed objective between Bristol and Pfizer in the issuance of that license. [4988a–4989a.]

The court also charged (4966a) that "the government does not claim that any of the license agreements involved in this case is in itself unlawful or in combination with any of the others, without reference to other facts. Accordingly, you may not infer an antitrust violation merely from the existence of such agreements or from any of the terms contained within them."

Throughout the trial the witnesses and the parties had referred to the Squibb-Upjohn licenses as limited or restricted, in the sense that they did not permit these companies to manufacture or to sell in bulk. See the government's main brief, p. 78. Bristol's counsel told the jury in his summation that this "term is used in the sense that the license was not as broad as it might have been" (4740a–4741a).

Bristol contends, however, that because the court spoke of the "limitation" in the licenses "which barred [Squibb and Upjohn] from manufacturing," the jury might have been led to believe that the licenses themselves prevented those companies from manufacturing. Although the licenses in terms did not bar Squibb and Upjohn from manufacturing,[2] that was their

[2] Bristol contends (Br. 38) that Squibb and Upjohn had an implied right to manufacture if they could not obtain tetracycline any other way (see 5019a). This contention is questionable, since in the licenses Squibb and Upjohn agreed not to assist the infringement of Pfizer's tetracycline claims, for example, by buying tetracycline from unlicensed sellers (see GX 51, 8509a–8510a; GX 52, 8522a–8523a). In addition, the entire history of the transaction between Squibb, Upjohn, Bristol and Pfizer reflected that the parties obviously contemplated that Squibb and Upjohn would obtain their bulk tetracycline from Bristol pursuant to their November 1955 arrangements.

practical effect. As the district court pointed out in discussing Bristol's exception to this charge (5019a), Squibb and Upjohn "didn't get a license to manufacture * * * [a]nd they were barred from manufacturing because Pfizer had a patent and they would be infringing if they manufactured."

The court made it clear, however, that the jury was to decide whether this limitation was the result of Bristol's independent business judgment or "was an agreed objective between Bristol and Pfizer in the issuance of that license" (4989a). In light of the entire charge and the arguments of counsel, the jury could not have misunderstood that the license agreements themselves contained an illegal restriction upon manufacturing, or that they could convict except upon concluding that, apart from those licenses, the parties had an understanding that Squibb and Upjohn would not be permitted to manufacture.[8]

c. In our main brief we discussed in detail the various grounds upon which the court of appeals held the instructions defective and showed that the instructions properly and fairly explained to the jury the issues

[8] Both Cyanamid (Br. 53, fn.) and Bristol (Br. 18) state that the government implies that the Pfizer-Bristol license limited Bristol to its two "presently existing bulk customers," whereas in fact the license merely provided for the payment of royalties on sales to those customers. All the government stated (Br. 22), however—in describing the Pfizer-Bristol settlement—was that Pfizer licensed Bristol at a royalty of "3½ percent of the net sales price of tetracycline products sold by Bristol and its 'presently existing bulk customers' which Pfizer knew were Upjohn and Squibb [citations omitted]." The government does not contend that the licenses themselves limited Bristol's bulk sales to those customers; it does contend, of course, that this limitation was a term of the conspiracy.

it had to decide and the basis upon which it was to make those decisions.[4] Respondents' extensive but minute criticisms of the instructions do not refute that analysis.

2. Respondents argue at length that they had independent business reasons for maintaining identical prices (*e.g.*, Pfizer Br. 30–33; Cyanamid Br. 27–32), for failing to lower prices as market shares were lost (*e.g.*, Pfizer Br. 37), for giving misleading information to the patent office to secure patents (Pfizer Br. 19) and for the pattern of settlements and licensing among them (*e.g.*, Pfizer Br. 20–25). They made this same argument to the jury (*e.g.*, 4812a), and the jury was instructed that

> it is the government's burden to show such acquiescence and participation as a matter of conscious choice beyond a reasonable doubt. It is not sufficient to show that the parties acted uniformly or similarly or in ways that may seem to have been mutually beneficial. If such actions were taken independently as a matter of individual business judgment, without any agreement or arrangement or understanding among

[4] Cyanamid states three times (Br. 11, 15, 55) that the government conceded that "genuine errors" occurred at the trial. The statement in our brief it cites, however, merely was that "in a large criminal antitrust trial * * * [i]t is almost inevitable * * * that some genuine errors will find their way into such a large and complicated record" (Govt. Br. 89). This statement was made in the "conclusion" section of the brief, in pointing out that if an appellate court searches the record in a large antitrust case to find error, the court almost inevitably will discern some respects in which it believes that particular situations could have been better handled. As its entire brief shows, the government obviously made no concession that any errors occurred.

> the parties, then there would be no conspiracy, even though the separate actions were substantially concurrent and tended toward the accomplishment of similar objectives separately pursued by the individual companies [4952a].

The jury thus had put to it, under proper instructions, the question whether the respondent's actions were the result of individual business judgment or of agreement, and by its verdict the jury reached the latter conclusion. This result was justified by the record in this case. Despite respondents' arguments, price competition can and does exist in oligopolistic industries and the jury was warranted in concluding that the restricted structure and price uniformity that characterized this industry between 1953 and 1961 was not the result of mere economic market forces—particularly in the absence of any expert testimony supporting the respondents' thesis. Similarly, the jury was justified in deciding that the occasions on which the respondents refused either to grant licenses under the tetracycline patent or to sell tetracycline in bulk to firms other than Bristol, Squibb and Upjohn [5]—following Pfizer's widely publicized announcement that it would not license anyone except Cyanamid (2319a–2327a, 2484a–2485a; GX 48, 8475a; GX 458, 8916a–8917a)—reflected not independent business judgment but a common plan.

[5] Pfizer refused twice to grant licenses under the patent (GX 619–623, 832–835, 804; 2538a) and refused three times to sell in bulk (GX 370–373, 742; 3579a). Cyanamid refused to sell in bulk three times (GX 304, 305, 630, 631, 632; 2059a–2060a). After December 1955, when the government contended Bristol joined the conspiracy, Bristol refused twice to sell in bulk (GX 180–182; 3256a; see, also, 3257a).

Firms in such industries are subject to conflicting pressures: on the one hand to cooperate with rival sellers to maintain monopoly prices and restrict output, thereby maximizing profits for all sellers; and on the other, to increase their own share of industry profits by acting independently in setting price and output. Bain, *Industrial Organization* (2d ed.), pp. 118–120. Collusive action, which is relatively easy to arrange in markets with only a few sellers, provides a means of insuring against the likely competitive deviations from administered prices which occur in oligopoly industries. *Ibid.* Pfizer concedes (Br. 28) that a doctor concerned for the welfare of his patients would, in choosing among several interchangeable broad spectrum antibiotics, "consider differences in the cost to his patient in making his choice. For this reason no producer of broad spectrum antibiotics would wish to be undersold by a competitor." Thus, although the total sales volume of broad spectrum antibiotics might not be increased by price reductions, a reduction might increase a particular seller's share of such sales.

Under the Sherman Act, the consensual understanding necessary to establish an unlawful combination or conspiracy does not depend upon any explicit communications, meetings or agreements. This is true whether the case is criminal (*American Tobacco Co.* v. *United States*, 328 U.S. 781, 809–810) or civil (*United States* v. *General Motors*, 384 U.S. 127, 142–143; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 43); acts in mutual expectation of reciprocal acts or restraints are enough (*Interstate Circuit* v. *United States*, 306 U.S. 208, 226–227; *United States* v. *Con-*

tainer Corp., 393 U.S. 333, 335; *Theatre Enterprises* v. *Paramount*, 346 U.S. 537).

The evidence justified the jury in concluding that at the time of the meetings which the government alleged marked the inception of the conspiracy between Pfizer and Cyanamid, and Bristol's subsequent entry, the parties had an understanding as to their future conduct. But the jury also might have concluded that the conspiracy was not perfected until after the specific meetings, *i.e.*, until the occurrence of a subsequent event.[6] That conclusion would have been consistent with the allegation in the indictment that the conspiracy consisted of a continuing agreement and concert of action (¶45, 33a). See *United States* v. *Houlihan*, 332 F. 2d 8 (C.A. 2), certiorari denied, 379 U.S. 828; *United States* v. *Postma*, 242 F. 2d 488 (C.A. 2). As the court of appeals recognized in its opinion on rehearing (12618a; 437 F. 2d 957, 958), it was unnecessary for the government to prove express agreements among the respondents to establish an illegal conspiracy in violation of the Sherman Act.

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[6] For example, the jury might have believed that the understanding between Pfizer and Cyanamid did not occur until the price of the bulk tetracycline Cyanamid sold to Pfizer was finally settled on the basis on the industry's rule of thumb that such costs should be one-third the market price (2900a); or until the first patent office interference between them was finally settled; or until McKeen publicized Pfizer's intention not to issue tetracycline licenses—all of which occurred after their initial November 1953 meetings. Similarly, the jury might have concluded that Bristol entered the conspiracy when the formal agreements between it, Squibb, Upjohn and Pfizer were executed in March 1956, some three months after its meeting with Pfizer in December 1955.

The three basic elements of the conspiracy—price fixing, excluding competitors and misleading the Patent Office—were interrelated. Price fixing could not be effective unless sales of tetracycline were restricted to the parties to the conspiracy; if the drug were sold to every pharmaceutical house that wanted it, the likelihood of price cutting would be greatly increased. Without a patent, however, there was no way to restrict the number of sellers in the market, and the result of broad access to the market—that "any Tom, Dick and Harry with a little bit of money could get in the busines" (3700a)—could have been the same kind of vigorous price competition and low profit margins that had characterized the sale of penicillin (see, *e.g.*, 3686a, 3096a–3097a). Pfizer, Cyanamid and Bristol thus each had a strong motive to insure that access to the market and price competition be limited, and that there be a valid patent that would insure those limitations.

3. Contrary to respondents' assertion that the jury had no standard by which to judge the claim that they had "unreasonably high" prices, the district court carefully explained (4994a–4995a) that this term, with respect to prices,

> is meaningful only if it is understood to refer to kinds of price behavior or price levels which appear to be divorced from variations and differences in available supply or demand or cost or other economic factors that may normally be expected to cause variations or changes in the prices charged in a competitive market.
>
> To put the thought in another and slightly shorter way, the charge of unreasonableness in this case is material only insofar as it poses the

issue whether the prices involved exhibit qualities or peculiarities of a type that could be deemed evidence that such prices resulted from agreement rather than competition.

The evidence in this case gave the jury a sound basis for determining under this standard whether the respondents' prices were unreasonably high. The president of Bristol testified (2900a) that there was a "rule of thumb in the pharmaceutical business" that "the best you can do" on prices "is four times your factory cost and that gives you enough money for research, to promote, hire salesmen, take care of general overhead, depreciation and all those things," and that "below three for one, it is just a rule of thumb, you cannot find enough funds to promote effectively and research effectively * * *." The ratio between respondents' factory costs and their selling prices of tetracycline, however, ranged from 6 to 1 to 19 to 1 (compare GX 930, 10324a with GX 934, 10325a).

4. Respondents' argument that the instructions unduly emphasized the "inflammatory" patent issue largely reflects their erroneous contention that the evidence that Pfizer and Cyanamid each misled the Patent Office was irrelevant to the conspiracy issues in this case. But the tetracycline patent was the keystone in creating the restricted structure of the industry which permitted price agreement and upon which respondents rely to justify price inflexibility. Thus the manner in which the patent was obtained was an essential element in the conspiracy charged.

Since the issue was relevant, it required detailed explanation if the jury was to understand the complicated evidence. The trial judge meticulously gave

such explanation. The fact that Pfizer and Cyanamid were not charged with having conspired to defraud the Patent Office did not make the evidence irrelevant. The question was whether, in order to obtain a product patent on tetracycline which could be used to exclude others from manufacturing and selling it, and to establish the condition for maintaining price uniformity, each separately misled the Examiner. That they may have been adversaries in other aspects of the proceedings (such as Cyanamid's attempt to obtain a process patent on an alternative method of manufacturing tetracycline) was not controlling on the issue of their conduct with respect to the product patent on tetracycline.

Although superficially it may appear anomalous for Cyanamid to have aided Pfizer in obtaining the patent as to which it conceded priority when the grant of the patent immediately would require Cyanamid to begin paying royalties, Mr. Edelblute, a Cyanamid patent lawyer who was in charge of Cyanamid's tetracycline patent application before the Patent Office (3588a), explained (3700a) that the "advantage to Cyanamid in Pfizer getting a patent" was that:

> We wouldn't have people like Bristol in the market for one, we wouldn't have the Italians importing it over here for another, and, of course, anybody—with no patent on tetracycline, any Tom, Dick and Harry with a little bit of money could get in the business.

The jury, on the evidence before it, was justified in concluding, as the Federal Trade Commission did on a separate record, that the withholding of informa-

tion from the Patent Office by Pfizer and Cyanamid "together with the cross-licensing agreement constituted an illegal attempt by Pfizer and Cyanamid to share in an unlawful monopoly which in the light of the subsequent exploitation of the tetracycline patent resulted in a combination in restraint of trade * * *." *Chas. Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574, 579 (C.A. 6), certiorari denied, 394 U.S. 920.

5. Respondents Cyanamid and Pfizer contend (Cyanamid Br. 7–11, Pfizer Br. 79–81) that they were denied a fair trial because of prejudicial publicity relating to high prices and profits in the drug industry. The district court fully reviewed this contention in its post-trial opinion (6449a–6453a; 281 F. Supp. 837, 840–842), and correctly rejected it. The court of appeals did not pass on the issue.

The question of possible prejudicial publicity was first raised at a pre-trial hearing in September, 1967, more than six years after the indictment was returned (1000a–1005a). The court there told the respondents that if they had "any doubt that you are going to get a fair trial" (1001a), they should "present any claims on that score in the form of an appropriate motion" (1002a), such as one "for adjournment or for a change of venue, or something like that" (1004a). The respondents made no such motion. It was only after all the evidence was in and both sides had rested that the respondents moved to dismiss the indictment, on the ground that unfavorable publicity had created an atmosphere in which a fair trial was not possible (5502a, 4924a). The court properly denied (4620a–4623a, 4926a) what it later described as an "eleventh

hour * * * final termination of the case in their favor" (6450a; 281 F. Supp. 837, 840).

The trial court took careful steps to assure that the jury was not improperly influenced. During the selection of the jury the district court asked a series of questions designed to bring to light any possible grounds of disqualification: whether the prospective jurors had any feelings for or against the defendant and co-conspirator companies or drug manufacturers generally (1392a–1393a), or had any views about the pricing of drugs or the practices of drug companies that might possibly lead to some bias concerning drug companies (1395a). The court inquired whether they had heard anything about this particular case or the drug industry generally that might influence them (1402a–1405a); and asked whether anything in their background would make it difficult for them to perform their function impartially (1407a). Several prospective jurors whose views about drug companies or drug prices might have influenced them were excused (see 1378a, 1395a–1396a, 1410a, 1417a, 1447a, 1454a, 1460a; 6449a, 6450a, 281 F. Supp. 837, 840). As the district court later noted, the jury panel was "subject to scrutiny by all concerned, including defense counsel, who submitted extensive voir dire requests and participated with characteristic intensity in the screening process" (6452a, 281 F. Supp. 837, 841).

After the jurors were sworn, the court expressly instructed them to refrain from reading or listening to reports of the case from any source (1430a, 1462a).

Immediately before charging the jury, the court, at respondents' request and over the government's ob-

jection, asked the jury whether any of them had heard or seen anything that "might possibly influence you or impair your ability to confine your thinking exclusively to the evidence in the case when you deliberate" (4940a). No juror indicated that he had. The court then reminded the jurors of their assurance that no outside influences before or during the trial would affect their deliberations, "as they must not" (*ibid.*), and similarly so admonished the jury in its final instructions (4943a).

There is thus no basis for respondents' contention that there was prejudicial publicity that may have affected the verdict.

For the foregoing reasons and those given in our main brief, the judgment of the court of appeals should be reversed and the case should be remanded to that court for further proceedings consistent with this Court's opinion.

Respectfully submitted.

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UNITED STATES *v.* CHAS. PFIZER & CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 70-72. Argued January 12, 1972—Decided January 24, 1972

426 F. 2d 32, affirmed by an equally divided Court.

Deputy Solicitor General Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General McLaren, Harry R. Sachse, Howard E. Shapiro,* and *Harry G. Sklarsky.*

John E. F. Wood argued the cause for respondents. With him on the brief for Chas. Pfizer & Co., Inc., were *Judson A. Parsons, Jr., J. Paul McGrath, Paul Sherman,* and *Arthur G. Connolly. Roy W. McDonald, Ralstone R. Irvine,* and *Richard Y. Holcomb* filed a brief for respondent American Cyanamid Co. *Merrell E. Clark, Jr.,* and *Henry J. Zafian* filed a brief for respondent Bristol-Myers Co.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.